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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

PIPER AIRCRAFT CORPORATION,

Petitioner

v.

SEVEN BAR FLYING SERVICE, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER FEDERAL RULE OF EVIDENCE 407 ENTITLED "SUBSEQUENT REMEDIAL MEASURES" PRECLUDES THE USE OF SUBSEQUENT REMEDIAL MEASURES TO PROVE THAT A PRODUCT WAS DEFECTIVE IN A PRODUCTS LIABILITY CASE BASED UPON A THEORY OF STRICT LIABILITY IN TORT.
2. WHETHER, UNDER FEDERAL RULE OF EVIDENCE 407, "FEASIBILITY" CAN BE DEEMED CONTROVERTED BY THE COURT WHEN THERE IS NO AFFIRMATIVE STIPULATION BETWEEN COUNSEL OF "FEASIBILITY".
3. WHETHER FEDERAL RULE OF EVIDENCE 407 WAS OTHERWISE INCORRECTLY INTERPRETED AND APPLIED BY THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

LIST OF PARTIES

1. Piper Aircraft Corporation is the petitioner herein and was the defendant in the United States District Court for the District of New Mexico and was the appellant in the United States Court of Appeals for the Tenth Circuit.

Seven Bar Flying Service, Inc. is the respondent herein and was the plaintiff-in-intervention in the United States District Court for the District of New Mexico and was an appellee in the United States Court of Appeals for the Tenth Circuit.

Piper Aircraft Corporation and Seven Bar Flying Service, Inc. are the only two parties to this appeal.

2. Dorine Herndon and Stellaretta O'Donnell were plaintiffs in the United States District Court for the District of New Mexico and were appellees in the United States Court of Appeals for the Tenth Circuit. Their claims were settled during the pendency of the appeal before the United States Court of Appeals for the Tenth Circuit and they were dismissed.

In the United States District Court for the District of New Mexico, Mitchell Industries, Inc. was a third-party defendant, but was dismissed from the case prior to trial.

3. In compliance with Supreme Court Rule 28.1, the Court is advised that except for Piper Acceptance Corporation, a wholly-owned subsidiary of Piper Aircraft Corporation, Piper Aircraft Corporation has no parent companies, subsidiaries or affiliates.

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PIPER AIRCRAFT CORPORATION,

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v.

SEVEN BAR FLYING SERVICE, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Piper Aircraft Corporation, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on September 2, 1983.

OPINIONS BELOW

The opinion of the United State Court of Appeals for the Tenth Circuit filed September 2, 1983 (Appendix "A," 25-47) is reported as *Herndon V. Seven Bar Flying Service, Inc.*, 716F.2d 1322 (10 Cir. 1983). The judgment of the United States District Court for the District of New Mexico (Appendix "B," 48-49), was filed May 22, 1981 and was not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was filed on September 2, 1983 (Appendix "A," 26). A timely petition for rehearing was denied on November 10, 1983 (Appendix "C," 50-51). See Supreme Court Rule 20.4. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Federal Rule of Evidence 407 states:
"When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."

STATEMENT OF THE CASE

An aircraft manufactured by Piper Aircraft Corporation (Piper) crashed in New Mexico. Thomas O'Donnell was the student pilot flying the aircraft and Charles Herndon, an employee of Seven Bar Flying Service, Inc. (Seven Bar), was the instructor. O'Donnell and Herndon were killed in the crash.

Dorine Herndon, as personal representative of the estate of Charles Herndon, and Stellaretta O'Donnell, as personal representative of the estate of Thomas O'Donnell, sued Piper in state court in New Mexico. Seven Bar intervened seeking damages from Piper for the loss of the aircraft and indemnification from Piper due to Seven Bar's earlier settlement of a wrongful death suit filed against it by Stellaretta O'Donnell.

Piper removed the case to federal court. The jurisdictional basis was diversity. After a jury trial, judgment was entered in favor of Herndon, O'Donnell and Seven Bar against Piper. Piper moved for a judgment n.o.v. or, in the alternative, for a new trial. Both motions were denied. Piper appealed. While the appeal was pending, Piper reached a settlement with Herndon and O'Donnell. The appeal continued as between Piper and Seven Bar.

The primary focus at trial was on a device known as a "pitch trim switch." Simply stated, this is a device which assists in making the aircraft fly level, nose-up or nose-down. It was contended that the pitch trim switch had a defective spring which "stuck" or "hung up" during flight causing the aircraft to go into a dive. It was contended that this caused the crash.

As originally designed, the pitch trim switch did not use a spring. A sponge-like silicon pad was used to cause the switch to return to the neutral position. In order to avoid problems from the switch "sticking" or "hanging up," Piper modified the design. The silicon pad was replaced with two small, linked coil springs. Aircraft owners were advised by Piper that these modifications should be made through the issuance in 1971 of "Piper Service Bulletin 331." These bulletins are issued by Piper to owners and operators of Piper aircraft in order to advise them of conditions in the aircraft which may require correction or maintenance. The aircraft which crashed was equipped as per "Piper Service Bulletin 331." "Piper Service Bulletin 331" was admitted into evidence and there is no appellate issue concerning this.

The crash occurred in 1975. On November 5, 1976, Piper issued "Piper Service Bulletin 527." This bulletin advised aircraft owners to modify the springs installed under "Piper Service Bulletin 331" by shortening them. Over Piper's objection, the District Court admitted "Piper Service Bulletin 527" as direct proof of a product defect. The District Court relied upon the rationale of *Ault v. International Harvester Company*, 13 Cal.3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1974). The District Court specifically stated:

> "...I'm going to allow the witness to testify concerning the subsequent remedial measure, and I'll probably be following

the *Ait (sic)* rationale in line of cases. So now you gentlemen have a square, an issue squarely presented for appeal in the case."

(Appendix "D," 52)[1]

Insofar as the "pitch trim switch" was concerned, the case was submitted to the jury on the following theories: (1) that Piper was negligent in its design of the "pitch trim switch"; (2) that Piper was liable under Restatement (Second) of Torts, Section 402A (1965) (Appendix "E," 53), as adopted in New Mexico, for designing a defective "pitch trim switch;" (3) that Piper was liable under Restatement (Second) of Torts, Section 402A, as adopted in New Mexico, for a "pitch trim switch" which was defective due to Piper's failure to adequately warn about a nose-down condition caused by the "pitch trim switch," or instruct on proper procedures for the pilot to follow should the condition arise. Thus, simply stated, there were claims with regard to the "pitch trim switch"[2] for (a) negligent design; (b) strict liability in tort for defective design; (c) strict liability in tort due to failure to warn. See, *Herndon v. Seven Bar Flying Service, Inc.*, supra, 716 F.2d at p. 1325. A verdict which was general in nature was returned; thus, Piper could have been found liable under any theory.

The Tenth Circuit affirmed this evidentiary ruling by the District Court. The Tenth Circuit held that the "subsequent remedial measures" prohibition of the first sentence of F.R.E. 407 did not apply to claims sounding in strict liability in tort under the Restatement (Second) of Torts, Section 402A (1965).

The Tenth Circuit also held, with respect to the second sentence of F.R.E. 407 dealing with exceptions to the general rule of prohibition, that:

"...unless a manufacturer expressly concedes that at the time of the accident it would have been possible to make a safer

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[1] In its "Appellee's Brief" before the Tenth Circuit, Seven Bar acknowledged (p. 7) that "Piper Service Bulletin 527 was offered and admitted under the rationale of *Ault v. International Harvester Company*, 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1975)."

[2] There was another products liability claim regarding the omission of a "trim interrupt or disconnect system" which did not involve the admission of "Piper Service Bulletin 527."

product, the manufacturer should be deemed to dispute that fact and plaintiff should be able to present evidence of later remedial measures to show their feasibility prior to the accident."
716 F.2d at p. 1329.

This latter holding was made despite the fact that feasibility was not an issue in the case.

Certain other evidentiary rulings made by the Tenth Circuit will be discussed briefly in the "Reasons" portion of this Petition.

REASONS FOR GRANTING THE PETITION

1. This case presents fundamental questions concerning the intent of the Supreme Court in promulgating and the intent of Congress in enacting F.R.E. 407. F.R.E. 407 has never been construed by this Court despite petitions for certiorari in previous cases in which courts of the federal circuits have reached contradictory conclusions as to the meaning and applicability of F.R.E. 407.

The proper meaning and application of F.R.E. 407 is a "bread and butter" issue for federal judges and the federal bar. There are approximately 671 federal District Court judges[3] who must interpret and apply F.R.E. 407 on a daily basis. Even further, approximately twenty-two states, Puerto Rico and the Military Rules of Evidence [4] have adopted evidence rules identical or similar to F.R.E. 407. Thus, any ruling by this Court would have a ripple effect on innumerable state courts.

2. One commentator has observed that, insofar as the rather staid area of evidentiary matters is concerned, the question of the applicability of F.R.E. 407 to strict products liability claims is "A Current Hot Debate." Kobayashi, *Products Liability Lawsuits—*

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[3] Compiled by counting the number of District Judges and Senior District Judges listed in Vol. 565 of the Federal Supplement (1983).

[4] Weinstein & Berger, *Weinstein's Evidence*, par. 407 [05] (1982 and December, 1982 Cum. Supp.)

Part I, 25 Trial Lawyer's Guide 297 (1981). Another commentator has stated that:

> "The situation demands a United States Supreme Court case directly addressing the issue of admissibility of subsequent measures evidence in products liability cases. Such a case would help eliminate, or at least reduce, the raging controversy between the various jurisdictions which have considered the issue."
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> Comment, *Federal Rule Of Evidence 407 And Its State Variations: The Courts Perform Some "Subsequent Remedial Measures" Of Their Own In Products Liability Cases*, 49 UMKC L.Rev. 338, 351 (1981)

Resolving conflicts between the various federal circuit courts is one of the primary duties of the Supreme Court. Supreme Court Rule 17.1(a). Such a conflict exists concerning the applicability of F.R.E. 407 to cases involving strict liability in tort. Indeed, the controversy surrounding F.R.E. 407 is now beyond the somewhat mild term of "conflict" but may be more aptly described as "war." It is often said that the presence of conflicting views in the Circuit Courts results in a "percolation" of ideas which ultimately facilitates a Supreme Court decision on a complex issue. See, e.g. Hellman, *Caseload, Conflicts And Decisional Capacity: Does The Supreme Court Need Help*, 67 Judicature 28 (Number 1, June-July, 1983). Petitioner submits that the "percolation" of F.R.E. 407 has now reached the point of diminishing returns and that the time is ripe for a definitive Supreme Court decision.

3. Essential to an evaluation of this case is an understanding of the concept of strict liability in tort in the context of products liability. The following is a concededly brief discussion.

As this was a diversity case[5], New Mexico substantive law applied. New Mexico adopted the Restatement (Second) of Torts, Section 402A (1965) in 1972. *Stang v. Hertz Corporation*, 83 N.M. 730, 497 P.2d 732 (1972). See also, *Ruiz v. Southern Pac.*

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[5] While the instant case is a diversity case, it is evident that the applicability of F.R.E. 407 to concepts of strict liability goes well beyond diversity cases. Even should diversity jurisdiction be ultimately abolished, this same issue will continue to arise in admiralty cases, F.E.L.A. cases, 45 U.S.C., Section 51, et

Transp. Co., 97 N.M. 194, 638 P.2d 406 (Ct. App. 1981). Essentially, strict liability in tort arises in two contexts: (1) when the product itself is defective and unreasonably dangerous due to such things as poor design or fabrication; (2) when the product is deemed defective and unreasonably dangerous due to the non-existence of or poor quality of warnings concerning the product. Compare, *Tenney v. Seven-Up Co.*, 92 N.M. 158, 548 P.2d 205 (Ct. App. 1978), cert. den. 92 N.M. 180, 585 P.2d 324 and *First National Bank In Albuquerque v. Nor-Am. Agr. Products, Inc.*, 88 N.M. 74, 537 P.2d 682 (Ct. App. 1975), cert. den. 88 N.M. 29, 536 P.2d 1085.

In either context, the manufacterer is under a duty. See e.g., *Fabian v. E. W. Bliss Co.*, 582 F.2d 1257 (10 Cir. 1978) [duty to use reasonable care in fabrication or making of a product and to adopt a safe plan or design for a product]; *Richards v. Upjohn Co.*, 95 N.M. 675, 625 P.2d 1192 (Ct. App. 1980), cert. den. 94 N.M. 675, 615 P.2d 992 [duty of drug manufacturer to use reasonable care to warn]; *First National Bank In Albuquerque v. Nor-Am Agr. Products, Inc.*, supra [duty of reasonable warnings]. The "duty" concept is paramount. Strict liability in tort is not "absolute liability." *Ruiz v. Southern Pac. Transp. Co.*, supra; *Tenney v. Seven-Up Co.*, supra. In *Marchese v. Warner Communications* 100 N.M. ___, 670 P.2d 113 (Ct. App. 1983), cert. den. 100 N.M. ___, 669 P.2d 735, the concept of "pure" comparative negligence as previously adopted in New Mexico in

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seq. (and, therefore, Jones Act cases, 46 U.S.C. Section 688, et seq.; see, e.g. *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11 Cir. 1982), cert. den. 103 S.Ct. 1774), Death On The High Seas Act cases, 46 U.S.C. Section 761, et seq., Federal Tort Claims Act cases, 28 U.S.C. Section 2671, et seq., and, undoubtedly, other types of cases. For example, in *Hall v. American S. S. Co.*, 688 F.2d 1062 (6 Cir. 1982), an unseaworthiness case, evidence of a subsequent change of policy as to hosing down the decks was admitted over objection. Acknowledging that "an unseaworthy condition [was] a species of strict liability," the Court, nevertheless, ruled that such was "culpable conduct" and was inadmissible because of F.R.E. 407. See also, *Chute v. United States*, 449 F.Supp. 172 (D.Mass. 1978), rev'd on other grounds 610 F.2d 7 (1 Cir. 1979), cert. den. 446 U.S. 936 [Suits In Admiralty Act, 46 U.S.C. Section 741, et seq. and general maritime law]. The continued presence of strict products liability issues in admiralty cases has been assured by the decision in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982), which held that collisions between pleasure boats on navigable waters were within admiralty jurisdiction.

Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981), was extended to strict liability actions. Thus, "fault" is apportioned in New Mexico. The "fault" to be apportioned includes that attributable to strict liability. Strict liability is a specie of "fault." *Marchese v. Warner Communications*, supra.

4. The applicability of F.R.E. 407 to actions sounding in strict liability has arisen in nine of the twelve Circuit Courts of Appeals. The result is conflicting and confusing. Three distinct positions exist: (1) F.R.E. 407 applies to actions sounding in strict liability; (2) F.R.E. 407 applies to some actions sounding in strict liability, but not to others; (3) F.R.E. 407 does not apply to actions sounding in strict liability.

Category No. 1 encompasses the First Circuit, *Roy v. Star Chopper Co., Inc.*, 584 F.2d 1124 (1 Cir. 1978), cert den. 440 U.S. 916, *Estate of Spinosa*, 621 F.2d 1154, 1160, n. 5 (1 Cir. 1980); the Second Circuit, *Cann v Ford Motor Company*, 658 F.2d 54 (2 Cir. 1981), cert. den. 456 U.S. 960;[6] the Third Circuit, *Knight v. Otis Elevator Co.*, 596 F.2d 84 (3 Cir. 1979), *Josephs v. Harris Corp.*, 677 F.2d 985 (3 Cir. 1982);[7] the Fourth Circuit, *Werner v. Upjohn Co., Inc.*, 628 F.2d 848 (4 Cir. 1980), cert. den. 449 U.S. 1080; the Fifth Circuit, *Grenada Steel Industries v. Alabama Oxygen Co.*, 695 F.2d 883 (5 Cir. 1982);[8] the Sixth Circuit, *Bauman v. Volkswagenwerk Aktiengesellschaft*, 621 F.2d 230 (6 Cir. 1980), *Hall v. American S.S. Co., 688 F.2d 1062 (6 Cir.*

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[6] See also, *Lindsay v. Ortho Pharmaceutical Corp.*, 637 F.2d 87 (2 Cir. 1980); *Smyth v. Upjohn Co.*, 529 F.2d 803 (2 Cir. 1975); *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152 (2 Cir. 1968) [pre-F.R.E. case]; *Stephan v. Marlin Firearms Company*, 353 F.2d 819 (2 Cir. 1965) [pre-F.R.E. case].

[7] See also, *Kenny v. Southeastern Pennsylvania Transportation*, 581 F.2d 351 (3 Cir. 1978), cert. den. 439 U.S. 1073; *Vockie v. General Motors Corporation, Chevrolet Div.*, 66 F.R.D. 57 (E.D. Pa. 1975), aff'd w/out opinion 523 F.2d 1052 (3 Cir. 1975).

[8] See also *Bickerstaff v. South Central Bell Tel. Co.*, 676 F.2d 163 (5 Cir. 1982); *Burks v. Firestone Tire And Rubber Co.*, 633 F.2d 1152 (5 Cir. 1981); *Arceneaux v. Texaco, Inc.*, 623 F.2d 924 (5 Cir. 1980), cert. den. 450 U.S. 928; *Foster v. Ford Motor Co.*, 621 F.2d 715 (5 Cir. 1980); *Foster v. Ford Motor Co.*, 616 F.2d 1304 (5 Cir. 1980); *Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334 (5 Cir. 1980), cert. den. 449 U.S. 1112; Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5 Cir. 1978); *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613 (5 Cir. 1977), cert. den. 435 U.S. 996.

1982); the Seventh Circuit, *Oberst v. International Harvester Co., Inc.*, 640 F.2d 863 (7 Cir. 1980).

Category No. 2 encompasses the Eighth Circuit. It's approach to F.R.E. 407 has been bizarre. In *Robbins v. Farmers Union Grain Terminal*, 552 F.2d 788 (8 Cir. 1977), it baldly held that Rule 407 was inapplicable in a strict liability action. This was followed in *Farner v. Paccar, Inc.*, 562 F.2d 518 (8 Cir. 1977) and *Unterberger v. Snow., Inc.*, 630 F.2d 599 (8 Cir. 1980). Then, the Eighth Circuit signaled a retreat. In *McGowne v. Challenge-Cook Bros., Inc.*, 672 F.2d 652 (8 Cir. 1982), it stated:

> "Appellants contend that the District Court erred in excluding evidence of "post-accident warning notices." This assignment of error raises questions in a developing and changing field of law. If these questions recur on retrial, they must be determined on the then controlling legal principles and decisions.
>
> "For example, the developing interpretations on the admissibility of subsequent remedial measures under Rule 407 Federal Rules of Evidence, are discussed in Fincham, Federal Rule of Evidence 407 and Its State Variations: The Courts Perform Some "Subsequent Remedial Measures" of their Own in Products Liability Cases, 29 UMKC L.Rev. 338 et seq. (1981). This Comment analyzes the state and federal cases on the exclusion of evidence of subsequent remedial measures. Included in these cases are *Robbins v. Farmers Union Grain Terminal Ass'n.*, 552 F.2d 788 (C.A. 8 1977) and *Farner v. Paccar, Inc.*, 562 F.2d 518 (C.A. 8 1977) in which this Court held that Rule 407, supra, is not applicable in strict liability actions. In contrast, the Second Circuit Court of Appeals has held that Rule 407, supra, is applicable in strict liability actions. *Cann v. Ford Motor Co.*, 658 F.2d 54, at 59-60 (C.A. 2 1981) noting that courts "have split over the proper resolution of this issue."
>
> "We note that on retrial these and other possible recurring questions can be determined by the district court under the developing law then controlling, including exercise of its discretion within lawful limits."
>
> 672 F.2d at p. 665.

McGowne was followed by *Haynes v. American Motors Corp.*, 691 F.2d 1268 (8 Cir. 1982). In a footnote, the Court somewhat hesitantly observed that: "Previous decisions of this court *indicate* that evidence of subsequent remedial measures is admissible under this theory [strict products liability]. (citation omitted)." (emphasis added) 691 F.2d at p. 1273, n. 5. The retreat quickened in *DeLuryea v. Winthrop Laboratories, Inc.*, 697 F.2d 222 (8 Cir. 1983). *DeLuryea* involved a drug. The strict liability claim was that the drug was defective due to the failure of the manufacturer to provide adequate warnings of the dangers of tissue damage at injection sites for the drug. The manufacturer urged that the District Court had erred in admitting evidence of a change in the wording of the package insert for the drug after the last date on which the plaintiff had used it. The Eighth Circuit agreed that this was error. After acknowledging the holdings of its prior cases that "the rule against admitting evidence of subsequent remedial measures does not apply to actions based on strict liability," 687 F.2d at p. 228, the Court then held that this was not true as to strict liability cases based on a claim of failure to warn. Thus, in the Eighth Circuit, it is the law that F.R.E. 407 does not apply to most strict liability cases, but does apply to some of them. When different strict liability theories are combined in one case, as is the normal situation, the potential for rampant confusion would seem readily apparent.

Category No. 3 includes only the Tenth Circuit. It stands alone among the Circuits. *Herndon v. Seven Bar Flying Service, Inc.*, supra, which is the subject of this petition for certiorari, alone, holds that F.R.E. 407 does not apply to any situation involving strict liability.

Neither the Ninth, Eleventh nor D.C. Circuits have ruled on this issue. The Ninth, however, appears inclined to join those jurisdictions in Category No. 1. See, *Longenecker v. General Motors Corp.*, 594 F.2d 1283 (9 Cir. 1979); *Brown v. Link Belt Corp.*, 565 F.2d 1107 (9 Cir. 1977).

5. The Federal Rules of Evidence are an enactment of Congress. In interpreting the true meaning of F.R.E. 407, the question is one of Congressional intent. "...Congress, not the court, has the final say.***" *United States v. Ragghianti*, 560 F.2d 1376, 1380-81 (9 Cir. 1977). At present, the Circuits have three mutually exclusive interpretations of the meaning and

application of F.R.E. 407 in strict liability cases.[9] There cannot be three mutually exclusive congressional intents. Assuming that one interpretation is correct, then the other two are nothing more than forbidden judicial legislation. In the Congressional Record for January 30, 1974, Mr. Smith of New York noted that the purpose of the Federal Rules of Evidence was to create uniformity "[t]hroughout all of the Circuits and all over the United States" and stated that "a judge would not be able to hold adversely to the codified rules of evidence and ... the only way those could be changed would be through further legislation.***" Congressional Record—House, Vol. 120, Part II, Jan. 30, 1974, pp. 1413-14. The Circuit Courts are proving Mr. Smith wrong. Petitioner submits that it is time for the Supreme Court to intervene and announce a single interpretation of F.R.E. 407 in the federal courts which interpretation will obviously have a substantial ripple effect on similar state rules. Petitioner further submits that the proper interpretation should be that adopted by the majority of the circuits, i.e. that F.R.E. 407 applies to all strict liability actions. This argument is based on case law, the simple language of the rule, legislative intent and basic common sense.[10]

a. Boeing Airplane Company v. Brown, 291 F.2d 310 (9 Cir. 1961) and *Powers v. J. B. Michael & Co.*, 329 F.2d 674 (6 Cir. 1964), are the only two United States cases cited in the Supreme Court "Advisory Committee's Note" to F.R.E. 407.

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[9] Practitioners in New Mexico are in the unique position of having Category No. 3 apply to federal cases they have in New Mexico (10th Circuit), Category No. 1 apply to federal cases they have in the neighboring state of Texas (5th Circuit) and no category apply to federal cases they have in the neighboring state of Arizona (9th Circuit).

[10] Note is made in passing of the proposed Model Uniform Product Liability Act, 44 Federal Register 62714-62750. In pertinent part, Section 107 of the proposed act states:

"(A) Evidence of changes in (1) a product's design, (2) warnings or instructions concerning the product, (3) technological feasibility, (4) 'state of the art,' or (5) the custom of the product seller's industry or business, occurring after the product was manufactured, is not admissible for the purpose of proving that the product was defective in design ... or that a warning or instruction should have accompanied the product at the time of manufacture....

***"

44 Federal Register at p. 62728.

See, 56 F.R.D. at pp. 225-26. The only United States Supreme Court case on this issue cited in either of those opinions is in *Boeing Airplane Company v. Brown*, supra, 291 F.2d at p. 315, and the case is *Columbia Railroad Co. v. Hawthorne*, 144 U.S. 202, 12 S.Ct. 591, 36 L.Ed. 405 (1892). Interestingly enough, this case involved a product, a machine called a "trimmer" in a sawmill. While the claim was in negligence, strict products liability being unknown at that time, it was a claim for "negligence in providing an unsafe and defective machine,...." 144 U.S. at p. 202. It was claimed below that there was "a latent defect in the machine, ..." *Columbia Etc. R. R. Co. v. Hawthorne*, 3 Wash. Terr. 353, 361 (1888). It is clear that under such a claim, it was incumbent upon the plaintiff to first prove that the machine was unsafe and defective, a situation incredibly analagous to the modern day strict product liability action. In *Columbia Railroad Co. v. Hawthorne*, supra, evidence of changes in the machinery since the accident was admitted over objection. The justification made by the District Court in support of admissibility was:

> "...where an accident occurs through defective machinery or defective fixtures on the machine itself, ... , then a change, repair or substitution of something else for the defective machinery is admissible as showing or tending to show the fact.***"
>
> 144 U.S. at p. 203.

Judgment was for the plaintiff. Defendant appealed. This Court reversed. Justice Gray stated:

> "***... the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant. (citations omitted)"
>
> 144 U.S. at p. 207.

The Court further concluded that:

> "...evidence of this kind ought not to be admitted under any circumstances."
> 144 U.S. at p. 208

Thus, this Court has spoken on this exact issue in a case in which proof of a defect in a product was a preliminary issue. The case has never been reversed and is underlying authority for F.R.E. 407. Therefore, not only does the Tenth Circuit's holding contradict Congressional intent and rulings in other Circuits, but it also contradicts prior Supreme Court case law.

b. The simple language of the rule precludes admission of subsequent remedial measures "to prove negligence or culpable conduct." To blithely say that "culpable conduct" does not include claims of strict liability in tort, as many jurisdictions do[11], is ignorance of reality. The latin term "culpa" means:

> "A term of the civil law meaning fault, neglect, or negligence.***"
> Black's Law Dictionary, Rev'd 4th Ed. (1968).

"Culpable" is defined as:

> "Blameable; censurable; involving the breach of a legal duty or the commission of a fault.***"
> Black's Law Dictionary, Rev'd 4th Ed. (1968).

Clearly, claims sounding in strict liability in tort involve a breach of duty and involve fault. Fault is an element of culpable conduct. It is significant to note that the Supreme Court "Advisory Committee's Note" states that "[t]he rule incorporates

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[11] The seminal case in this area, *Ault v. International Harvester Company*, supra, so holds. Compare, the contrary holding in *Werner v. Upjohn Co. Inc.*, supra. *Werner* specifically states that:

> "..., if the rationale of *Ault* were applied in the federal courts, it might effectively override rule 407 .... ***"
> 628 F.2d at p. 857.

One commentator has described the *Ault* decision as "a step backward in the protection of consumers from unsafe products."
Comment, 13 San Diego L.R. 208, 230 (1975).

conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of *fault*." 56 F.R.D. at p. 225 (emphasis added).

c. F.R.E. 407 appears to have sailed through Congress with almost no comment.[12] Thus, to determine intent, one must look at the plain language of the rule and the Supreme Court's "Advisory Committee's Note" which was sent to the Congress. Both have been briefly discussed supra and will not be repeated here.

d. The basic common sense behind the rule also requires that it be applied to strict liability cases. It is presumptuous for courts to make basic policy decisions as to manufacturers' conduct when Congress was presumably aware of such in promulgating the rule. As the Fifth Circuit has observed:

> "It has been suggested that evidence of a change in the manufacturing process or the design of a product has probative value because 'a business is not likely to change a product unless the change promotes safety and is feasible.' R. Lemport & S. Saltzburg, *A Modern Approach to Evidence* 189 (1977). But this argument is based on little direct evidence of why manufacturers make product changes. Similarly, most of the arguments made against admissibility rely on undocumented assumptions about how evidence of such changes might affect litigation. A priori judgments concerning why manufacturers do or do not alter their products, made by such dubious experts as judges, lawyers, and law professors, suffer from excessive reliance on logical deduction and surmise without the benefit of evidence of

[12] "Congress made no change in Rule 407, and it was neither the subject of floor debate, nor the subject of discussion during the course of committee hearings on the Rules in the House of Representatives. Professor Victor E. Schwartz, in a communication to the Special Subcommittee, objected that Rule 407 paid insufficient recognition to the principle of *Erie v. Tompkins* [304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)]:***" Weinstein & Berger, *Weinstein's Evidence*, p. 407-1 (1982). A comprehensive compilation of the legislative history of the Federal Rules of Evidence is contained in Bailey & Treller, *The Federal Rules Of Evidence: Legislative Histories And Related Documents*, William S. Hein & Co., Buffalo, N.Y., 1980, Library of Congress Cat. Card No. 79-57110, a four volume collection.

industry practice or economic factors. It seems to us, with no greater expertise than like-trained lawyers and judges, that changes in design or in manufacturing process might be made after an accident for a number of different reasons: simply to avoid another injury, as a sort of admission of error, because a better way has been discovered, or to implement an idea or plan conceived before the accident. The cost of making the change, the acceptance of the altered product in the market place, and whether the change is one of several that can be made contemporaneously might also be considerations.

"We cannot really know why changes are made by industry generally, or why a change was made in a particular product in the absence of evidence on the question. Instead, we ought to consider the probative value of such evidence on the point at issue. The real question is whether the product or its design was defective at the time the product was sold. See S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 181 (3d Ed. 1982). The jury's attention should be directed to whether the product was reasonably safe at the time it was manufactured."
695 F.2d at pp. 887-88[13]

The 4th Circuit has observed further that:

"The defendant argues that we should adopt the rule of some courts, that the rule against admitting evidence of subsequent remedial measures not apply in product liability cases. See *Ault v. Int'l Harvester*, 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1974). We are not persuaded. The Court assumes that the product is defective, and thus overlooks the situation where the product is not defective but could be made better. The manufacturer who undertakes precautionary measures in this setting will face the risk of liability for an injury caused by the earlier nondefective version of the product based on evidence of his subsequent act which made the product safer but in no way supports an inference that the initial version of the product was defective. Further-

[13] See also, *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 86 (E.D.N.Y. 1975).

more, if the rationale of *Ault* were applied in federal courts it might effectively override Rule 407 since its reasoning that evidence of subsequent precautionary measures is admissible in product liability cases might apply with equal force to a negligence cause of action. However, Congress, in enacting Rule 407, has chosen to exclude such evidence as proof of negligence and the *Ault* court offers no basis for distinguishing between the two theories. *Smyth v. Upjohn Company*, 529 F.2d 803 (2nd Cir. 1975) rejects the holding of *Ault* as do we.

"Our conclusion is supported by the close similarity between negligence and strict liability. The elements of both are the same with the exception that in negligence plaintiff must show a breach of a duty of due care by defendant while in strict liability plaintiff must show the product was unreasonably dangerous. The distinction between the two lessens considerably in failure to warn cases since it is clear that strict liability adds little in warning cases. Under a negligence theory the issue is whether the defendant exercised due care in formulating and updating the warning, while under a strict liability theory the issue is whether the lack of a proper warning made the product unreasonably dangerous. Though phrased differently the issue under either theory is essentially the same: was the warning adequate? *Chambers v. G. D. Searle & Co.*, 441 F.Supp. 377, 381 (D.Md. 1975), aff'd 567 F.2d 269 (4th Cir. 1977); *Smith v. E. R. Squibb & Sons, Inc.*, 273 N.E.2d 476, 480 (Mich. 1979); Prosser, Torts, Section 99, Esp. p. 659 n. 73 (4th ed. 1971).

"Any remaining distinction in theories disappears when a failure to warn case involves an unavoidably dangerous drug which the product in this case admittedly was. The Restatement of Torts (2d) Section 402A, comment k makes it clear that a drug manufacturer is not to be held strictly liable for injuries caused by an unavoidably dangerous new drug if the warning is adequate. The standard for liability under strict liability and negligence is essentially the same. *Chambers*, supra, at p. 381.

"Since the issue under either theory is the same, a decision which admits evidence of subsequent remedial measures on

a strict liability theory in a failure to warn case involving an unavoidably dangerous drug would promote substance over form and subvert the policy behind excluding evidence of subsequent remedial measures. We decline the invitation to follow the other courts which may have held so, and prefer the reasoning of *Chambers*, exactly to the point here, and *Smith*, nearly so." 628 F.2d at pp. 857-58.

In construing F.R.E. 407, at least in the federal arena, those courts holding for inapplicability to strict liability actions ignore the basic nature of the rule. Such courts often state that subsequent remedial evidence is at least marginally relevant under F.R.E. 401. This ignores the fact that, as a matter of policy, Congress has declared such evidence to be irrelevant.[14]

The rule itself is the policy decision, one made by the legislature. It is not for the federal courts to revise that policy. As the Seventh Circuit has noted:

"***Unlike most of the other Federal Rules of Evidence, however, Rule 407 is based primarily upon policy considerations, and not upon relevancy or concern for truth finding.***" *Oberst v. International Harvester Co., Inc.*, 640 F.2d at p. 867, n. 2.

The policy decision, made by the Congress is that such evidence is inadmissible to prove "negligence or culpable conduct." Culpable conduct clearly includes fault and fault is a crucial component of strict liability claims. In the instant case, such evidence was used to prove a product defect. Petitioner submits that this was improper and requires reversal of both the District Court and the Circuit Court.

6. The Tenth Circuit also ruled that:

"Unless a manufacturer expressly concedes that at the time of the accident it would have been possible to make a safer product, the manufacturer should be deemed to dispute that

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[14] Such evidence is deemed "legally irrelevant." See, Peterfreund, *Relevancy And Its Limits In The Proposed Rules Of Evidence For The United States District Courts: Article IV*, 25 The Record (Of The Association Of The Bar Of The City Of New York) 80 (1970).

fact and plaintiff should be able to present evidence of later remedial measures to show their feasibility prior to the accident."[15]
716 F.2d at p. 1329.

This ruling is clear error as it ignores the language of the rule, and, therefore, the Congressional intent behind it. In pertinent part, the second sentence (the "exceptions" sentence) of F.R.E. 407 states:

> "***This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ... feasibility of precautionary measures, if controverted,...."

In its ruling, the Tenth Circuit has read the "if controverted" language out of the rule and has shifted the burden of proof. This is improper "judicial repeal" of the rule. See, *Ault v. International Harvester Co.*, supra, dissent of Justice Clark, 528 P.2d at p. 1157. Such a blatant distortion of the "exceptions" portion of F.R.E. 407 was addressed by the Fourth Circuit in *Werner v. Upjohn Co., Inc.*, supra. It stated:

> "***..., Rule 407 does allow evidence of subsequent remedial measures to be used to prove the feasibility of such measure, but only if feasibility is controverted by the defendant. The Advisory Committee notes to Rule 407 state in terms that 'unless a genuine issue' of feasibility is present the exception should not apply. The plaintiff contends that the issue of feasibility was controverted sufficiently to invoke the exception. His first argument is that no concession was

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[15] The Tenth Circuit stated that at a bench conference, Piper "admitted the feasibility of the modification," but "refused to stipulate to feasibility of the change." 716 F.2d at p. 1325. This analysis of the facts by the Tenth Circuit is disturbing as there was no request for any such stipulation since feasibility was not an issue. The pertinent portions of the bench conference are attached at Appendix "F", 54-61. Even assuming such fact to be true, however, the question remains the same: Is the ruling of the Tenth Circuit a proper one? In a case with facts virtually identical to those in the instant case, the Fifth Circuit ruled that feasibility was not controverted and, therefore, was not at issue. *Grenada Steel Industries v. Alabama Oxygen Co.*, supra.

made by defendant on this issue. However, *it is clear from the face of the rule that an affirmative concession is not required.* Rather, feasibility is not in issue unless controverted by the defendant."

628 F.2d at pp. 854-55. (emphasis added)

See also, *Bauman v. Volkswagenwerk Aktiengesellschaft*, supra; *Knight v. Otis Elevator Co.*, supra; *Grenada Steel Industries v. Alabama Oxygen Co.*, supra; *Foster v. Ford Motor Co.*, supra.

The Tenth Circuit is in obvious and irreconcilable conflict with the clear language of F.R.E. 407, not to mention the other Circuits cited supra. The Fourth Circuit and other Circuits have followed the clear language and intent of F.R.E. 407. The Tenth Circuit has ignored the language and intent. The Tenth Circuit should be reversed.

7. The Tenth Circuit attempted to justify admission of "Piper Service Bulletin 527" on various alternative grounds. Two have been addressed already, the asserted non-applicability of F.R.E. 407 to strict products liability actions and the "feasibility" exception. These are the primary issues for the Court's concern and, in themselves, mandate reversal and remand for a new trial. See, e.g. *Columbia Railroad Company v. Hawthorne*, supra; *Werner v. Upjohn Co., Inc.*, supra; *Hall v. American S.S. Co.*, supra. *Bauman v. Volkswagenwerk Aktiengesellschaft*, supra, describes this type of error as "basic error." 621 F.2d at p. 232. Nevertheless, the other attempted justifications by the Tenth Circuit are replete with error and propriety deems that the errors be urged to this Court for review.

a. The Tenth Circuit states that:

"The trial court in the present case did not give the jury an instruction which would have precluded it from considering Service Bulletin 527 as evidence of Piper's negligence or culpable conduct. Had Piper submitted a limiting instruction at the appropriate time or objected with the required specificity to the trial court's actual jury instructions, ..., the trial court should have added such limitations to its charge to the jury."

716 F.2d at p. 1330.

The above-quoted observation by the Tenth Circuit is nonsensical insofar as it applies to "culpable conduct." The District Court admitted "Piper Service Bulletin 527" as evidence of a defect under the strict products liability claims on the basis of *Ault v. International Harvester Co.*, supra. Given the ruling of the District Court that the evidence was admissible for such purpose and that F.R.E. 407 did not apply to strict liability claims, requesting a limiting instruction to the contrary would have been ludicrous and would obviously have been refused.[16]. Cf, *Werner v. Upjohn Co., Inc.*, supra, 628 F.2d at p. 854. This gratuitous comment by the Tenth Circuit is clear error.

b. The Tenth Circuit also states that:

> "... defendants who introduce otherwise unrebuttable evidence of plaintiff's contributory negligence are in a poor position to dispute admission of evidence of their subsequent remedial measures where the evidence is necessary for plaintiff to counter the contributory negligence defense.***"
> 716 F.2d at p. 1331.

An earlier Tenth Circuit case, *Rimkus v. Northwest Colorado Ski Corporation*, 706 F.2d 1060 (10 Cir. 1983), was cited. In *Rimkus*, the subsequent remedial measure evidence was admitted "for the purpose of showing that the plaintiff was not guilty of contributory negligence." 706 F.2d at p. 1065. Such was not the basis for admission in the instant case, however. That being the case, the Tenth Circuit was engaging in nothing more than gratuitous comment. Even further, from the cases cited in *Rimkus*, 706 F.2d at pp. 1065-66, it is evident that what the Tenth Circuit is actually talking about is an "impeachment" exception[17] to F.R.E. 407. Again, the evidence was not admitted for that

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[16] A limiting instruction limits the purposes for which evidence may be considered. The challenged evidence was specifically admitted by the District Court to prove a defect under the strict products liability claims. It simply makes no sense to say that a limiting instruction telling the jury not to consider the evidence for the purpose for which it was specifically admitted should have been requested.

[17] Concern has been repeatedly expressed by commentators and courts that too expansive a reading of the "impeachment" exception might "swallow up" or result in "unnecessary undercutting the policy objective of the basic

purpose. As noted in *Werner v. Upjohn Co., Inc.*, supra, "the fact that the evidence might have been admissible on some other ground not raised at trial should not prevent reversal and a new trial." 628 F.2d at p. 856. See also, *Foster v. Ford Motor Co.*, supra, 621 F.2d at p. 721.

c. The F.A.A. (Federal Aviation Administration) issued an "Airworthiness Directive"[18] which required Piper Aztec owners to make the "pitch trim switch" modification described in Bulletin 527 within 100 flight time hours. "The [District] court sustained Piper's objection to these directives." 716 F.2d at p. 1325. Ignoring the fact that the District Court found this directive inadmissible and distorting the reasons given by the District Court[19] the Tenth Circuit ruled that:

> "These directives ... were admissible under Rule 407. Where a superior authority requires a tort feasor to make post-accident repairs, the policy of encouraging voluntary repairs which underlies Rule 407 has no force—a tort feasor cannot be discouraged from voluntarily making repairs if he must make repairs in any case."
> 716 F.2d at p. 1331.

The Court then went on to rule that:

> "***..., even if the court were to rule that Piper's service bulletins were improperly admitted, ... [a]dmitting those [F.A.A.] directives would place the same evidence before the jury that appellant objects to now. Thus, if admitting the

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exclusionary rule." See *D.L. By Friedrichs v. Huebner*, 110 Wis.2d 581, 329 N.W.2d 890, 898-901 (1983); 2 Weinstein and Berger, *Weinstein's Evidence*, par. 407 [05] (1982).

[18] C.A.A. (now F.A.A.) directives were found to have "little relevance" in *Northwest Airlines v. Glenn L. Martin Company*, 224 F.2d 120, 130 (6 Cir. 1955). Compare, *Arceneaux v. Texaco, Inc.*, supra [design changes made solely in response to federal environmental regulations held "irrelevant under Federal Rules of Evidence 401 and 402." 623 F.2d at p. 928].

[19] The District Court clearly felt that insufficient foundation was laid as to what led up to the promulgation of the directive by the F.A.A. Pertinent argument thereon is included at Appendix "G," 62-68, Appendix "H," 69-72, Appendix "I," 73.

bulletins was error, it was harmless error because it did not prejudice Piper. (citations omitted)"
716 F.2d at p. 1331.

This doubletalk ignores at least two particularly significant and rather basic considerations. It ignores the fact that the District Court did not admit them. Thus, they were not evidence in the case. The decision not to admit them [under F.R.E. 403] was reversible only for abuse of discretion. The Tenth Circuit made no ruling that the District Court abused its discretion. Thus, the Tenth Circuit bases its holding on a point of evidence properly excluded by the District Court and, therefore, not properly a part of the record in this case. To petitioner, this seems to be gross error. It further ignores the fact that the District Court did not admit the directive, inter alia, because insufficient foundation was shown for admissibility; particularly ignored is the District Court's concern that the directive was issued by the F.A.A. *at Piper's suggestion and request*! (See especially, Appendix "H," 69-70, Appendix "I," 73). Compare, *Werner v. Upjohn Co, Inc.*, supra, 628 F.2d at pp. 859-60; *Wolf By Wolf v. Procter & Gamble Co.*, 555 F. Supp. 613, 622-24 (D.N.J. 1982).

The directive should not have even been an issue on appeal. Nevertheless, petitioner notes that in cases in which the issue has been properly preserved there is a conflict in the circuits as to the admissibility of such directives. Compare, e.g. *Vockie v. General Motors Corporation, Chevrolet Div.*, supra; *Haynes v. American Motors*, supra; *Rozier v. Ford Motor Co.*, supra; *Russell v. Page Aircraft Maintenance, Inc.*, 455 F.2d 188 (5 Cir. 1972); *Werner v. Upjohn Co., Inc.*, supra; *Arcenaux v. Texaco, Inc.*, supra. *Werner* even notes that such an "exception" to F.R.E. 407 "would subvert the policy goals of both rule 407 and [the regulations]." 628 F.2d at p. 860.

CONCLUSIONS

Volumes could be written on the basic question of whether or not F.R.E. 407 applies to strict products liability actions. This question has already been the subject of voluminous commentary in appellate court decisions and scholarly publications. Petitioner respectfully requests this Court to grant this petition for certiorari and to allow full briefing of this fundamental question and the other questions raised in this petition for ultimate decision by this Court.

The audacity and scope of the Tenth Circuit's decision, combined with the listing of federal and state court cases involving F.R.E. 407 and similar state rules in the appendix to the opinion seem to petitioner to constitute an open invitation to this Court to address the meaning and scope of F.R.E. 407.

The petition for writ of certiorari should be granted.

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APPENDIX "A"

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
SEP 02 1983
HOWARD K. PHILLIPS
Clerk

DORINE HERNDON, Personal Representative of the estate of Charles Herndon Deceased, and STELLARETTA O'DONNELL, Personal Representative of the estate of Thomas O'Donnell, Deceased, Plaintiffs	)	
v.	)	
SEVEN BAR FLYING SERVICE, INC., Plaintiff-in-Intervention-Appellee	)	No. 81-1805
v.	)	
PIPER AIRCRAFT CORPORATION, Defendant-Appellant	)	
MITCHELL INDUSTRIES, INC., Third Party Defendant	)	

Appeal from the United States District Court
for the District of New Mexico
(Civ. No. 78-191-C)

Robert P. Smith, Law Offices of L. B. Ullstrom, Denver, Colorado, for Plaintiff-in-Intervention-Appellee

W. R. Logan, Civerolo, Hansen & Wolf, P.A., Albuquerque, New Mexico (Cynthia A. Fry, Civerolo, Hansen & Wolf, P.A., Albuquerque, New Mexico, with him on the briefs), for Defendant-Appellant

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Before BARRETT, DOYLE and SEYMOUR, Circuit Judge

DOYLE, Circuit Judge

This is a suit based on manufacturer's liability. It arose out of an airplane accident. Thomas O'Donnell, deceased, was a student who was practicing instrument flying. He was piloting a Piper Aztec Aircraft. He wore a visor-like hood to simulate night or poor weather flying—he could see his instruments, but was unable to see outside the plane. His instructor on the flight, Charles Herndon, was an employee of Seven Bar Flying Service, Inc. ("Seven Bar"). The accident occurred on the night of February 26, 1975, in Bernalillo County, near Albuquerque, New Mexico.

The original action was brought by the widows of O'Donnell and Herndon. The complaint was filed in the District Court of Santa Fe County, New Mexico, on February 13, 1978, by Dorine Herndon, personal representative of the estate of Charles Herndon, and by Stellaretta Bolton (formerly Mrs. Thomas O'Donnell), personal representative of the estate of Thomas O'Donnell. The Piper Aircraft Corporation ("Piper") was named as defendant. Seven Bar, which is the appellee here, intervened. It sought recovery for the loss of its aircraft and indemnification resulting from its settlement of a wrongful death suit made earlier with Stellaretta O'Donnell.

On March 24, 1978, Piper removed the cause to the Federal District Court. Thereafter the case went to trial and Piper's appeal is from the judgements which were entered thereon.

The equipment which was alleged to have caused the crash is called the pitch trim switch. It is located on the pilot's wheel. Plaintiff's relied on evidence that the pitch trim mechanisms were in the nose-down position. Their contention was that the pitch trim switch had a defective spring which caused it to hang up. Plaintiffs maintained that when O'Donnell had used the switch to modify the plane's attitude the switch had stuck. Thereupon the plane went into a full dive. Neither O'Donnell nor Herndon could correct this and the crash occurred.

The pitch trim switch, as originally designed, used a sponge-like silicone pad underneath the rocker switch to cause it to return to the neutral position as soon as a pilot stopped applying pressure to it. In order to avoid the problems resulting from the switch sticking or hanging up, Piper modified the design. It replaced the silicone pad with two small, linked coil springs. The owners of the aircraft which had the old design were

told by Piper about the necessary modifications. This was through Piper Service Bulletin 331, which was issued in 1971. Reports which followed revealed that the switch still had a tendency to hang up, so Piper again made a modification of the switch's design. It did so by shortening the coil springs. Through Piper Bulletin 527, issued November 5, 1976, the owners were told to modify the springs they had installed under Bulletin 331, by cutting away a portion of each spring's coil.

Plaintiffs introduced into evidence Piper Service Bulletin 331, issued prior to the accident, and Piper Service Bulletin 527. The latter had been published over a year after the accident. At a pretrial conference, as well as during trial, Piper objected to admission of its Service Bulletin 527. Their argument was that as a subsequent remedial measure it was inadmissible under Rule 407 of the Federal Rules of Evidence. Plaintiffs' response was that the bulletin was admissible; that Rule 407 applied only to negligence cases and not to strict liability. It was relevant and was necessary to satisfy plaintiffs' burden on the issues of design defect, availability, cost and practicality. In a bench conference Piper conceded that it designed the switch. It also admitted the feasibility of the modifications. At the same time, however, Piper refused to stipulate to feasibility of the change. Indeed, at trial Piper denied the existence of a defective design. Piper's position at trial was that Herndon and O'Donnell's negligence in flying inattentively and in failing to react properly to any possible trim switch hang up caused the accident. As an alternative to forbidding admission of the bulletin, Piper originally requested the court to give a limiting instruction, but Piper neither included a limiting instruction in its requested instructions, nor did it object to the absence of such an instruction.

The trial court allowed plaintiffs to mention the service bulletin in opening arguments. It also admitted the bulletin into evidence during the trial. Plaintiffs also sought to admit Airworthiness Directive 77-09-10 issued by the Federal Aviation Administration which required Piper Aztec owners to make the trim switch modification described in Bulletin 527 within 100 flight time hours. Plaintiffs also attempted to introduce a similar FAA directive, No. 71-12-05, which was issued to make mandatory the Bulletin 331 modification.

The court sustained Piper's objection to these directives. Its

reason was that under Rule 403 their probative value was outweighed by the possible "prejudicial conclusion of an unsafe condition made by someone in the FAA" following the Agency's "unspecified investigation." The court felt there was no need to risk the prejudicial affect the directives might produce since the Piper Service Bulletins it had admitted covered essentially the same ground and thus overemphasized the matter.

The court also limited plaintiffs' attempts to offer the testimony of other pilots who had experienced in-flight emergencies. To avoid cumulative evidence, plaintiffs were permitted only to read the transcript of one pilot's testimony to rebut testimony of pilots offered by Piper.

The trial lasted for thirteen days. The jury was instructed on both theories of recovery, that is negligence and strict liability. The jury could have found Piper negligent for failure to use ordinary care by designing a trim switch that was susceptible to malfunctioning or by failing to install a trim interrupt or disconnect system. Alternatively, the jury could hold Piper strictly liable for designing a trim switch that was unreasonably dangerous or for omitting a trim interrupt or disconnect system and for failing to warn owners adequately of the danger.

The jury was also instructed that Piper asserted the defense of contributory negligence on the part of O'Donnell and Herndon in failing to use ordinary care in planning and executing their training flight.

The jury determined that O'Donnell and Herndon were each 10% responsible for their accident and that Piper's liability was 80%. The jury calculated that Piper owed Herndon $229,000 and O'Donnell $380,000. There was some uncertainty whether the jury meant that Piper's 80% liability to Herndon and O'Donnell totalled $229,000 and $380,000, respectively, or whether those sums equaled the total of plaintiff's damages. The court and counsel resolved that problem by treating the awards as the total damages and reducing them by 20%, and ordering Piper to pay Herndon's estate $183,200 and O'Donnell's estate $232,000, plus 80% of their taxable costs.

Regarding Intervenor Seven Bar's claims for property damages from the loss of its aircraft and for indemnity for its settlement with Mrs. O'Donnell, based on the settlement agreement between Mrs. O'Donnell and Seven Bar, and the New

Mexico Court of Appeals decision in Claymore v. City of Albuquerque, No. 4804/4805 (N.M. Ct. App. Dec. 9, 1980), *reprinted in* Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981), the court determined that Piper should indemnify Seven Bar for 80% of the $110,000 settlement with Mrs. O'Donnell ($72,000). The undisputed value of the aircraft was $49,750, which the court reduced by 20% to arrive at the amount Piper owed Seven Bar for property damages. Piper was ordered to pay Seven Bar $111,800 plus 80% of its taxable costs.

Piper moved for judgment notwithstanding the verdict, and, in the alternative, for a new trial. Both motions were denied, and this appeal followed.

ISSUES

1. Did the trial court err when it admitted a service bulletin issued by Piper over a year following plaintiffs' accident? This was pertaining to Federal Rule of Evidence 407.

2. Did the trial court err when it apportioned the damages between tort feasors in accordance with a settlement agreement and the jury's determination of the tort feasors' percentage of comparative fault?

We have considered the issues which are presented to us and note that they are, for the most part, trial issues. The exception is the indemnity issue which we will take up after having considered the principal evidentiary problem which is relied upon for reversal.

Rule 407 in a Products Liability Case

Did the admission of the service bulletin issued by Piper more than a year after the accident constitute error? We conclude that it did not. The ultimate question here is: Did the trial court comply with Rule 407 of the Federal Rules of Evidence?

Procedural issues generally are governed by federal law. However, we need not determine whether the present evidentiary matter is procedural. Here we need only decide that the evidence in question is admissible. Fed. R. Evid. 1101(b); Rigby v. Beech Aircraft Co., 548 F.2d 288, 291-93 (10th Cir. 1977); *See also*,

Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 885 (5th Cir. 1983). The trial court, in exercising its discretion regarding admissibility, must examine the background of the rule together with the rule itself. The court may also look to the reasoning employed by other circuit, district or state courts in reaching their decisions. *See* Hartford v. Gibbons and Reed Co., 617 F.2d 567, 569 (10th Cir. 1980); Cottonwood Mall Shopping Center, Inc. v. Utah Power and Light Co., 440 F.2d 36, 40 (10th Cir.), *cert. denied*, 404 U.S. 857 (1971). No New Mexico court has yet addressed the issue of admissibility of subsequent repair evidence in a strict liability case. We therefore apply Rule 407 of the Rules of Evidence.

In reviewing the trial court's decision to admit or to exclude evidence, this court looks not only to the propriety of the trial court's legal reasoning, it also considers the trial court's evidentiary decision as a whole; that is, in the context of the entire trial record. Prudential Insurance Co. of America v. Faulkner, 68 F.2d 676, 678 (10th Cir. 1934). If the record were to indicate that the trial court set forth inadequate reasons or no reasons for its evidentiary decision, this court would examine the record to determine whether the facts supported the trial court's decision. Sims Consolidated, Ltd. v. Irrigation and Power Equipment, Inc., 518 F.2d 413, 418 (10th Cir. 1975). An error in either admitting or excluding evidence does not justify the setting aside of a verdict or the granting of a new trial unless the error affected the substantial rights of the parties. Rule 61, Fed.R.Civ.Proc.; Harris v. Quinones, 507 F.2d 533 (10th Cir. 1974).

In reviewing the trial court's decision, we conclude that the court looked not only to proper legal reasoning, but also the trial court correctly considered the total trial record in passing on the present question.

The trial court's ruling that Service Bulletin 527 was admissible was based on Rule 407. That bulletin is not unlike an automobile manufacturer's recall letter. The owners of Piper Aztec airplanes were told that despite replacing the pitch trim switch's original silicone pad with coil springs, Piper had reports that the trim switch still had a tendency to hang up in either the nose-up or nose-down position. Piper recommended that the remedy was to cut one quarter coil off the end of each of the linked coil springs underneath the rocker switch. The switch and its springs

were depicted in a large cut-away illustration, and owners and their mechanics were given a step-by-step procedure to follow in order to make the correction. This bulletin was not issued until over a year after O'Donnell and Herndon's accident.

Rule 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The rule is pretty much a codification of the common law rule which excluded remedial measures taken after an accident. Scant leglislative history together with uncertainty over some of the terms and the breadth of the exceptions, for instance where evidence may be used to impeach or to prove feasibility, has produced a split of authority on the question of acceptance into evidence of such a document as Bulletin No. 527 in products liability suits.

Some courts apply Rule 407 to strict liability product manufacturer cases, as well as to negligence cases. (For a complete citation of all the authorities *see* the attached Appendix.) A policy reason for excluding evidence of subsequent repairs is the desire to foster Rule 407's underlying purpose of encouraging tort feasors to take steps to remedy a hazardous condition in their control. The rule can be seen to assure manufacturers, for example, that the admissions which they make in issuing a recall letter will not be used as evidence of their negligence by plaintiffs with claims arising from circumstances before the corrective steps were taken. Another justification for this exclusionary rule is that evidence of subsequent remedial measures is sometimes uncertain. Such evidence can be confusing because the jury has to focus on the circumstances at the time of the accident, so subsequent occurrences may be misleading.

Other courts have rejected the use of Rule 407 in products liability cases. These courts discount the policy argument underlying Rule 407 as applied to product manufacturers on

several grounds. Principally, the public policy which underlies imposing liability for defendants' negligence is at odds with the purposes behind strict liability. Restatement (Second) of Torts, 402 A (1965); W. Prosser, Handbook of the Law of Torts, § 103, at 671-72 (4th ed. 1971). In negligence actions, the jury's focus is on defendants' conduct. Exclusion of evidence of subsequent conduct under Rule 407 is appropriate because it fosters the principle of assessing liability based on the reasonableness of defendants' conduct at the time of the accident at issue. Rule 407's exclusion of evidence, however, is inappropriate in actions against defendants who are pursuing activities for which society has decided to assess strict liability. For instance, in strict liability regimes such as New Mexico, society chooses to place responsibility for the potential losses from producing an unsafe airplane with the manufacturer, regardless of the reasonableness of the manufacturer's design decisions. In actions against such manufacturers, therefore, the jury's sole inquiry is on the product. Employing Rule 407 to exclude evidence of the product's safety that is relevant and not prejudicial, as determined under Rules 401 and 403, would thwart the policies that underlie strict liability by an illogical imposition of a negligence-based rule of evidence. D. L. by Friedericks v. Huebner, 110 Wis.2d 581, 329 N.W.2d 890, 903 (1983).

On a more practical level, several courts have observed that it is unrealistic to think a tort feasor would risk innumerable additional lawsuits by foregoing necessary design changes simply to avoid the possible use of those modifications as evidence by persons who have already been injured. Furthermore, insurors would not tolerate their insured manufacturers refusing to take remedial measures. Governmental agencies, as well as juries contemplating punitive damage claims, would also be unlikely to approve of such callous behavior. Finally courts note that there is no evidence which shows that manufacturers even know about the evidentiary rule or change their behavior because of it.

Courts have also dismissed the possibility of confusing the jury with evidence of post-accident remedies. This is said to be a danger that should be considered by trial courts in the same manner that Rule 403 requires them to judge all evidence to determine its probative value and to ascertain whether its probative value is outweighed substantially by any possible

prejudice. Such evidence is unquestionably "relevant," as that term is defined by Rule 401, so there is no justification for excluding it under Rule 407 where the trial court determines that the potential of the evidence to confuse or prejudice the jury does not substantially outweigh its probative value.

There are two recent decisions which ought to be considered. Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983) and D. L. by Freiderich v. Huebner, 110 Wis.2d 581, 329 N.W.2d 890 (1983). Both pertain to Rule 407 in relationship to strict liability and product manufacturer cases. Both of these decisions have considered carefully the Rule's language and legislative history, and the opinions of other courts and various legal scholars. They came to opposite conclusions.

The Fifth Circuit in *Grenada Steel* relied on both the deterence of voluntary remedial measures and the jury confusion rationales to hold that evidence of subsequent remedial measures could not be admitted against the manufacturer and supplier of an acetylene gas cylinder which exploded and caused a very destructive fire. The court acknowledged the existence of contrary precedent, starting with the state court decision in Ault v. International Harvester Co., 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1979), and most notable in a string of Eighth Circuit decisions culminating in Unterberger v. Snow Co., 630 F.3d 599, 603 (8th Cir. 1980). Nevertheless, the Fifth Circuit felt that it could not know with any certainty whether manufacturers relied on Rule 407 in making post-accident decisions. Therefore, the court in *Grenada Steel* chose not to risk dissuading manufacturers from taking subsequent remedial measures and refused to admit such repairs.

That policy decision, however, was not the principal basis for the *Grenada Steel* decision. Instead the court relied primarily on the relevance rationale for excluding evidence of subsequent remedial measures:

> [O]ur decision does not rest only on theses about the influence of possible tort liability or human conduct. It rests more firmly on the proposition that evidence of subsequent repair or change has little relevance to whether the product in question was defective at some previous time. 695 F.2d at 887.
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> Interpreted to require the evidence to focus on the time when the product was sold, Rule 407 would conform to the policy expressed in Rule 403, the exclusion of relevant information if its probative value is substantially outweighed by the danger of confusion. 695 F.2d at 888.

We are unpersuaded by the *Grenada Steel* court's decision for excluding evidence under Rule 407 in a strict liability case. As discussed above, the policy argument underpinning Rule 407 cannot logically be extended to strictly liable defendants. The reasonableness of their conduct is not at issue, so there is no reason to exclude evidence of their conduct.

The Fifth Circuit's relevancy rationale is similarly unconvincing. Under Rule 401, evidence is "relevant" if it has *any tendency* to make the existence of a fact more or less probable than it would be without the evidence. Evidence of subsequent repairs is thus relevant because a possible inference the jury can draw is that the product at issue was defective before defendant implemented the remedial measures. That does not mean such evidence is automatically admissible. The trial court must still weigh the evidence's potential for prejudice against its probative value under Rule 403.

The Fifth Circuit's discussion of the feasibility exception to Rule 407 should be noted. Immediately following the ruling quoted above, the court recognized that the challenged evidence regarding later design modifications could have been admitted if the feasibility of making design changes had been "controverted." The difficulty with this exception to Rule 407 when a manufacturer merely states that its product was safe at the time of the accident without expressly admitting the ease of safer alternatives is determining whether the manufacturer "controverted" the "feasibility of precautionary measures."

The Fifth Circuit endorsed the reasoning in 23 C. Wright & K. Graham, Federal Practice & Procedure, § 5288, at 144 (1980):

> "The administration of Rule 407 would be greatly simplified if the appellate courts were to hold that in all of these [negligence and product liability] situations, feasibility of precautionary measures will be deemed 'controverted' unless defendant manufacturer is prepared to make an unequivocal admission of feasibility." 695 F.2d at 888.

In other words, unless a manufacturer expressly concedes that at the time of the accident it would have been possible to make a safer product, the manufacturer should be deemed to dispute that fact and plaintiff should be able to present evidence of later remedial measures to show their feasibility prior to the accident.

Plaintiff in *Grenada Steel* did not ask defendant-manufacturer to make such an admission, so the Fifth Circuit declined to rule that the evidence there should have been admitted under the feasibility exception to Rule 407. 695 F.2d at 889.

In our case, however, Piper was asked to stipulate to the feasibility of modifying the pitch trim switch. This Piper declined to do. It had a perfect right to decline, of course, and the ease of merely clipping the switch's springs must have been apparent to the jury; so it would have been pointless for Piper to deny the "feasibility" of that design modification. Nevertheless, the test set out by Professors Wright and Graham is sensible and even where the feasibility of remedial measures is as apparent as in our case, manufacturers should be deemed to controvert that feasibility unless they unequivocally admit it. The failure by manufacturers to clarify this factual matter for the jury will mean that evidence of subsequent remedial measures should be admitted under the controverted feasibility exception to Rule 407. The decision in our case is not grounded in this ruling, however.

The authorities and reasoning of the Eighth Circuit in Unterburger v. Snow Co., *supra*, and of the Wisconsin Supreme Court in D.L. by Freiderich v. Huebner, *supra*, provide support for the present decision. *See also* Oberst v. International Harvester Co., 640 F.2d at 863, 867-71 (7th Cir. 1980) (Swygert, J., concurring and dissenting, in part). These decisions exemplify the limited reading given Rule 407 in strict liability cases. The *Huebner* opinion in particular thoroughly considers both the bases for Rule 407 and the authority relevant to applying the rule in products liability suits. Embracing the precedent which finds Rule 407 inapplicable to strict liability actions, the Wisconsin Supreme Court upholds the admission of evidence that defendant manufacturer added warning labels and metal guards to its forage chopper wagons after one of them amputated plaintiff's hand. D. L. by Freiderich v. Huebner, *supra*, 329 N.W.2d at 905.

This is the first time this court has directly considered the

applicability of Rule 407 to a strictly liable product manufacturer. Rockwood Ins. Co. v. Clark Equipment Co., Nos. 81-2321, 81-2348, slip op. at 4 (10th Cir. July 25, 1983). We have had occasion before, however, to address Rule 407 in another context.

This court recently held in Rimkus v. Northwest Colorado Ski Corporation, 706 F.2d 1060 (10th Cir. 1983) that evidence of post-accident remedial measures, the placing of crossed poles above a rock outcropping to warn skiers of a hazard, was admissible to rebut evidence of plaintiff's contributory negligence. In *Rimkus* we said:

> Rule 407 prohibits the admission of evidence of subsequent repairs when that evidence is introduced for the purpose of proving negligence of the defendant. Where it relates to the alleged contributory negligence of plaintiff it should not be considered prejudicial. Indeed, where any other purpose exists the jury should be allowed to hear and consider the evidence. Advisory Committee's Notes, quoted in 2 Wigmore on Evidence, 284(4) (1979) at 181. Cases such as the one at bar present a recognized difficulty in applying Rule 407. "[T]he feasibility of a precaution may bear on whether it was negligent not to have taken the precaution; thus negligence and feasibility are often not distinct issues." *Weinstein, supra*, at 407-18.
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> The trial court might well have chosen to exclude the evidence. The judge was fully aware of the problem. He weighed the countervailing contentions with care. He made it plain that it was to be considered only with respect to other issues besides the possible negligence of the defendant. Thus, we see no basis for finding and concluding that the acceptance of the evidence for a limited purpose was eroneous. 706 F.2d at 1066.

Two facts distinguish *Rimkus* from the present appeal. First, *Rimkus* was a failure to warn case based on negligence; the jury's verdict in plaintiff's favor could only have been based on its determination that the ski area was negligent for failing to mark the rock outcropping and that the ski area's negligence caused Mr. Rimkus' accident. Second, the trial court in *Rimkus* gave the jury the following limiting instruction:

"Further, ladies and gentlemen, you are instructed that there has been evidence in this case that the area where the accident occurred was later marked by the defendant. This evidence can be considered not as to any negligence on the part of the Defendant, but only as to the feasibility of marking the area." 706 F.2d at 1064.

The trial court in the present case did not give the jury an instruction which would have precluded it from considering Service Bulletin 527 as evidence of Piper's negligence or culpable conduct. Had Piper submitted a limiting instruction at the appropriate time or objected with the required specificity to the trial court's actual jury instructions, Rule 51, Fed.R.Civ.Proc., the trial court should have added such limitations to its charge to the jury.

While it would be possible to reverse on plain error grounds the trial court's omission of a limiting instruction, this court ordinarily will not exercise that power unless the error "'may well have been a generating factor which culminated in a verdict not warranted under the law,'" Pridgin v. Wilkinson, 296 F.2d 74, 76 (10th Cir. 1961) or "'where it is apparent on the face of the record that a miscarriage of justice may occur.' 5 A. Moore's Federal Practice, Parag. 5104." *Cited in* Fox v. Ford Motor Co., 575 F.2d 774, 786 (10th Cir. 1978).

Here, it was not plain error for the court to omit a limiting instruction which, had one been offered or had Piper objected to the court's charge, the court in its discretion could have used to guide the jury. Further, Piper's request for a limiting instruction prior to the three-week trial following denial of its motion in limine, did not serve as a sufficient notice of its objection to the instructions. Corriz v. Naranjo, 667 F.2d 892, 896 (10th Cir. 1981); Taylor v. Denver and Rio Grande Railroad Co., 438 F.2d 351, 353-54 (10th Cir. 1971). *See also* D. L. by Freiderichs v. Huebner, *supra*, 329 N.W.2d at 902. (Upon request, the trial court could have fashioned an instruction limiting the jury's "use of evidence of remedial measures to the permissible purpose." Citing 23 C. Wright & K. Graham, Federal Practice & Procedure, § 5291, at 155-56 (1980)); Farner v. Paccar, Inc., 562 F.2d 518, 528 (8th Cir. 1977).

The *Rimkus* case considered above sets forth two grounds for upholding the admission of the evidence at issue now. First, *Rimkus* recognized that where there is *any* purpose for admitting evidence of subsequent repairs besides proving defendant's negligence, the jury should be allowed to hear and consider that evidence. Second, defendants who introduce otherwise unrebuttable evidence of plaintiff's contributory negligence are in a poor position to dispute admission of evidence of their subsequent remedial measures where the evidence is necessary for plaintiff to counter the contributory negligence defense. The holding here, however, rests on additional grounds.

As set forth above, the trial court refused to admit the FAA Airworthiness Directives tendered by plaintiffs. In light of the court's previous admission of Piper's service bulletins, whether the probative value of the FAA Directives was substantially outweighed by the prejudicial affect of placing such repetitive evidence before the jury was a decision within the trial court's discretion.

These directives, however, were admissible under Rule 407. Where a superior authority requires a tort feasor to make post-accident repairs, the policy of encouraging voluntary repairs which underlies Rule 407 has no force—a tort feasor cannot be discouraged from voluntarily making repairs if he *must* make repairs in any case. *See, e.g.*, Rozier v. Ford Motor Co., 573 F.2d 1332, 1343, (5th Cir. 1978) (trend cost estimate admissible under Rule 407 because government agency would have required it (dictum)); Lolie v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974) (evidence that after the accident a state inspector required mine operators to give added support to the power cable which fell was admissible under Rule 407 because the repairs were made by a third party (but such evidence was properly excluded as cumulative); *see generally* Annot., Subsequent Remedial Measures, 50 ALR Fed 935, 937 § 4.

Airworthiness Directives describe unsafe conditions and set forth mandatory precautions that must be taken in order to operate the affected aircraft, 14 C.F.R. § 39.1; Melville v. American Home Assurance Co., 584 F.2d 1306, 1315 (3rd Cir. 1978). Therefore, even if this court were to rule that Piper's service bulletins were improperly admitted, in their absence the trial court's concern with the cumulative effect of admitting the

Airworthiness Directives would have had no basis. Admitting those directives would place the same evidence before the jury that appellant objects to now. Thus, if admitting the bulletins was error, it was harmless error because it did not prejudice Piper. Rule 61, Fed.R.Civ.Proc., Harris v. Quinones, 507 F.2d 533, 539 (10th Cir. 1974).

We have sought to outline the reasons why this court should affirm the ruling of the trial court admitting the challenged evidence. We have taken the position that under Rimkus v. Northwest Colorado Ski Corporation, *supra*, 706 F.2d at 1066, the rule should be narrowly construed. And so where there is any reason for use of the evidence other than to establish the defendant's negligence, Rule 407 should not appy. The reason that has been recognized is that Rule 407 excludes only evidence which is used to prove defendant's negligence or culpable conduct; its applicability in strict liability cases is not expressly provided for and has been rejected. Where there is no issue of culpability the jury's focus is only on the existence of a defect. Where plaintiffs assert both that the manufacturer was negligent and, alternatively, that strict liability standards should apply, the trial court upon request can fashion appropriate limiting instructions. D. L. by Friederichs v. Huebner, *supra*, 329 N.W.2d at 903-05. This view of the limited applicability of Rule 407 in a product's liability suit together with our conclusion that even if it was error to admit the service bulletin, it was harmless error because the trial court should have admitted the airworthiness directive, forms the basis of today's decision.

New Mexico's Indemnity Law

Piper argues on appeal that the trial court misinterpreted New Mexico law regarding indemnity. Issues concerning comparative fault and indemnification among joint tort feasors are governed by state law. Kansas City Power and Light Co. v. United Telephone Company of Kansas, Inc., 458 F.2d 117 (10th Cir. 1972). Here, New Mexico has recently adopted comparative fault. Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234, 1239-42 (1981). The present issue is whether New Mexico changed its indemnity law by adopting comparative fault.

Where no state court has addressed clearly the substantive legal issue, federal courts must use their own discretion to anticipate the rule state courts in similar circumstances likely would make. West v. American Telephone and Telegraph Co., 311 U.S. 223, 237 (1940). The district court's views interpretive of state law carry extraordinary force on appeal where there are no controlling state decisions providing clear precedent. Hartford v. Gibbons and Reed Co., 617 F.2d 567, 569 (10th Cir. 1980). Therefore, this court may overturn such decisions only where they are prejudicial and clearly erroneous. Rule 52(a), Fed.R.Civ.Proc.; Fox v. Ford Motor Co., 575 F.2d 774, 789 (10th Cir. 1978); Rigsby v. Beech Aircraft Co., 548 F.2d 288,291 (10th Cir. 1977); Julander v. Ford Motor Co., 488 F.2d 839, 844 (10th Cir. 1973).

In February, 1981, the New Mexico Supreme Court adopted the concept of comparative negligence. Scott v. Rizzo, *supra*. To date, however, that court has not decided whether traditional indemnity principles remain in force notwithstanding its conversion to comparative negligence. Two New Mexico appellate court opinions have been handed down after *Rizzo*. These cases were decided on the basis of indemnity principles. *See* Stock v. Adco Gen'l Corp., 95 N.M. 544, 632 P.2d 1182, 1186 (N. Mex. Ct. App. 1981); Dessauer v. Memorial Gen'l Hosp., 96 N.M. 92, 628 P.2d 337, 342 (N. Mex. Ct. App. 1981). The language of these cases indicates adherence to traditional indemnity principles. The courts in these cases were not required to decide what effect New Mexico's newly adopted comparative negligence approach in *Rizzo* would have on its indemnity doctrine.

In this case, traditional indemnity principles do not, as Piper asserts, bar its indemnification of Seven Bar. As stated by the *Adco* court, a tort feasor (here, Seven Bar) held proximately liable for its own negligence (or, as here, the negligence of Seven Bar's employee Herndon) in failing to discover and remedy a dangerous condition created by another (here, Piper's defective switch) has been allowed indemnity. Furthermore, this allowance of indemnity "follows from a determination that the wrongdoers were not *in pari delicto*, that is, negligent in an equal degree, even though all may have been guilty of wrongdoing toward the plaintiff." *Adco, supra*, at 1186.

We recognize that it would be open to the Supreme Court of New Mexico, if confronted with this issue, to determine whether comparative negligence has superseded traditional indemnity principles. It is true that when other states have adopted the comparative negligence approach, the indemnity principles in those states have changed from the traditional all or nothing approach of damages measured by the degree of comparative fault of all the parties. *See* Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980); Tolbert v. Gerber Industries, Inc., 255 N.W.2d 362 (Minn. 1977); Dole v. Dow Chemical Co., 30 N.W.2d [sic: N.Y.2d] 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1977).

The trial court did not err in awarding Seven Bar indemnification against Piper.

Appellant raises additional issues of trial procedure in which it alleges the court erred. We have reviewed these issues carefully and find them to be without merit.

The judgments of the trial court should be and the same are hereby affirmed. It is so ordered.*

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* The New Mexico Court of Appeals, an intermediate court, recently discussed contribution among joint tort feasors in a medical malpractice case, Wilson v. Galt, 22 N.M. State Bar Bulletin 842 (June 21, 1983).

In the opinion there is discussion which is interesting but speculative regarding the state of the New Mexico law as it pertains to responsibility of joint tort feasors, but nothing that affects our case. The *Wilson* court's holding was finally controlled by the parties' settlement agreement, so its consideration of New Mexico's contribution law is pure *obiter dictum*. Apparently, if the *Wilson* court had been required to decide the issue, it would have ruled that plaintiffs could obtain the full share of damages assessed against a non-settling joint tort feasor even though there had been a recovery by plaintiffs amounting to more than that obtained from the joint feasors who chose to settle.

That view of the law is in accord with the result in the trial court in the present appeal. Here Seven Bar settled for more than it was found liable for by the jury. Piper argues that it should not have to indemnify Seven Bar because if it paid plaintiff O'Donnell Piper's full share of damges, she would have double recovery: the Piper damage award plus the amount Seven Bar paid in excess of its liability. On the other hand, the *Wilson* court's view was that no such "double recovery" would shield non-settling joint tort feasors. Applied to our case that would mean that Piper cannot claim its liability should be reduced because Seven Bar settled with Mrs. O'Donnell; so the trial court under this analysis could not err by ordering Piper to indemnify Seven Bar.

APPENDIX

Several circuits have read Rule 407 to exclude evidence of subsequent remedial measures in strict liability, product manufacturers cases. To date only the Eighth Circuit has consistently and explicitly held that Rule 407 does not exclude such evidence in products liability cases. *Compare* Unterberger v. Snow Co., 630 F.2d 599, 603 (8th Cir. 1980); Farner v. Paccar, Inc., 562 F.2d 518, 528 (8th Cir. 1977); Robbins v. Farmer's Union Grain Terminal Ass'n., 552 F.2d 788, 792-95 (8th Cir. 1977) *with* Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 885-89, (5th Cir. 1983); Hall v. American S.S. Co., 688 F.2d 1062, 1066-67 (6th Cir. 1982); Josephs v. Harris Corp., 677 F.2d 985, 990-91 (3rd Cir. 1982); Cann v. Ford Motor Co., 658 F.2d 54, 59-60 & n.4 (2nd Cir. 1981), *cert. denied*, 456 U.S. 960 (1982).

Other circuits either have not yet decided the issue or have failed to clarify the basis for their decisions regarding Rule 407. Oberst v. International Harvester Co., 640 F.2d 863 (7th Cir. 1980); Longenecker v. General Motors Corp., 594 F.2d 1283, 1286 (9th Cir. 1979); Roy v. Star Chopper Co., 584 F.2d 1124, 1134 (1st Cir. 1978), *cert. denied*, 440 U.S. 916 (1979).

The particular difficulty distinguishing strict liability from negligence in failure to warn cases against manufacturers of unavoidably dangerous drugs has caused the Eighth and other circuits to hold subsequently changed package instructions inadmissible under Rule 407. Deluryea v. Winthrop Laboratories, 697 F.2d 222, 228-29 (8th Cir. 1983); Lindsay v Ortho Pharmaceutical Corp., 637 F.2d 87, 93-94 (2nd Cir. 1980); Werner v. Upjohn Co., 628 F.2d 848, 856-58 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).

Although there is also a split of authority among state courts, far more state courts have recognized that Rule 407, or its state equivalent, has no applicability in strict liability cases. In some instances, state legislatures have clarified whether post-accident repair evidence may be admitted. *Compare* Alaska R. Evid. 407, Hawaii R. Evid. 407, Maine R. Evid. 407(a) (which admit evidence to show dangerous defects in products liability cases) *with* Ariz. Rev. Stat. Ann. § 12-686(a) and Neb. Rev. Stat. § 27-407 (which expressly forbid admitting evidence to prove defects against product manufacturers).

For state cases addressing the admissibility of evidence of subsequent remedial measures *see generally* Grenada Steel Indus., Inc., *supra*, 695 F.2d at 886-87 nn. 2-3; Annot., 74 A.L.R. 3d 1001 (1976). Recent state cases not cited in the above include: Roberts v. May, 41 Colo. App. 82, 583 P.2d 305, 309 (1978) (post-accident automobile design changes admissible); Hartman v. Opelika Machine and Welding Co., 414 So.2d 1105, 1110 (Fla. App. 1982), *reh'g denied*, 426 So.2d 27 (Fla. 1973) (post-accident repair evidence admissible against defendant because performed by third party); Ortho Pharmaceutical Corp. v. Chapman, 378 N.E.2d 541,558 (Ind. 1979) (evidence of subsequent warning of drug side effects warning inadmissible); Millette v. Radosta, 84 Ill. App. 3d 5, 39 Ill. Dec. 232, 404 N.E.2d 823,834 (1980) (mandatory recall letter admissible); Siruta v. Hesston Corp., 232 Kan. 654, 659 P.2d 799, 808-09 (1983) (evidence of subsequent precautions not offered to prove negligence admissible in products liability cases); Carey v. General Motors Corp., 377 Mass. 736, 387 N.E.2d 583, 587-88 (1979) (post-accident automobile recall letter admissible); D. L. by Friederichs v. Huebner, 110 Wis.2d 581, 329 N.W.2d 890 (1983) (discussed in the opinion, infra); Caldwell v. Yamaha Motor Co., Ltd., 648 P.2d 519, 523 (Wyo. 1982) (evidence of post-accident design change admissible).

No. 81-1805—Herndon, et al. v. Seven Bar Flying Service, etc.

SEYMOUR, J., concurring.

While I join the majority opinion in most respects, and I concur in the result, I disagree with the majority's analysis of the "indemnity" issue.

In my view, we need not address whether Seven Bar is entitled to indemnity from Piper under New Mexico law, because Piper has not "indemnified" anyone. Prior to trial, Seven Bar and O'Donnell's estate entered into an agreement wherein Seven Bar paid the O'Donnell estate $110,000 in settlement of all claims between these two parties. However, Seven Bar conditioned its agreement to pay the $110,000 in advance on O'Donnell's promise to return any portion of the settlement amount that was

in excess of what the jury determined to be Seven Bar's liability. The jury found Seven Bar only 10% liable and Piper 80% liable. The jury further assessed O'Donnell's damages at $380,000. Under standard principles of comparative negligence, Piper was liable to O'Donnell for 80% of the $380,000 award, or $304,000; and Seven Bar was liable for 10% of the $380,000, or $38,000. By the terms of the settlement agreement between Seven Bar and the O'Donnell estate, Seven Bar was entitled to recover from O'Donnell the difference between the $110,000 originally paid and the $38,000 that the jury held represented Seven Bar's liability to O'Donnell. Thus, O'Donnell owed Seven Bar $72,000. As a simple accounting measure, and nothing more, the judge below merely subtracted $72,000 from the $304,000 that Piper owed O'Donnell and ordered it paid to Seven Bar, thus eliminating the need for O'Donnell to pay Seven Bar the $72,000 directly. The judge then ordered Piper to pay the remaining $232,000 to O'Donnell. In sum, Piper paid only the total amount that the jury held it was liable for—$304,000.

Even if the settlement agreement between O'Donnell and Seven Bar had permitted O'Donnell to keep the entire $110,000, Piper still would not have any right to pay less than its assigned liability. The most recent opinion of the New Mexico Court of Appeals that addresses New Mexico's contribution law, *Wilson v. Galt*, 22 N.M. State Bar Bulletin 842 (June 21, 1983), makes clear that "[i]f the settling tort feasor paid more in settlement than his apportioned share of the total damages as determined, the injured person, without reduction, would retain the benefit of the contractually made bargain.... Reduction of the recovery against nonsettling defendants by the percentage of negligence attributable to the settling defendants, as opposed to a specific dollar amount paid in settlement, would carry out the principles laid down in *Claymore* [v. City of Albuquerque, aff'd sub nom, Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981)], and *Bartlett* [*v. New Mexico Welding Supply, Inc., 88 N.M. 152, 646 P.2d 579 (Ct. App. 1982)*] *22 N.M. State Bar Bulletin at 845.*[1]

Accordingly, I agree with the trial court's ultimate disposition, although for reasons different from those given by the majority.

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[1] Unlike the majority, I do not consider the *Wilson* discussion of New Mexico's contribution law mere *obiter dictum*. The court of appeals in *Wilson* had to make clear its rationale for affirming the trial court below. The trial court had

footnote 1 continued

held that the plaintiff could not recover anything from a non-settling defendant, because the plaintiff had already recovered in a settlement agreement with other defendants more than the damage award. 22 N.M. State Bar Bulletin at 844. Had the court of appeals merely affirmed, it might have left the impression that New Mexico's contribution law had remained unaffected by the recent adoption of comparative negligence principles in that state. *See Claymore* and *Bartlett*. Thus, only after clarifying the law in New Mexico could the *Wilson* court address the settlement agreement. Indeed, the settlement agreement was dispositive of this case only because in the court's view the law in New Mexico had changed. The *Wilson* decision could hardly have held the settlement agreement dispositive without some explanation why it was necessary to discuss it in the first place.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DORINE HERNDON, Personal Representative of the Estate of Charles Herndon, Deceased, et al.,

Plaintiffs,

and

SEVEN BAR FLYING SERVICE, INC.,

Intervenor,

vs.

PIPER AIRCRAFT CORPORATION,

Defendant.

FILED
UNITED STATES DISTRICT COURT
SANTA FE, NEW MEXICO

MAY 22, 1981

/s/Jesse Casaus,
Clerk

JUDGMENT

THIS ACTION came on for trial before the Court and the jury, the Honorable Santiago E. Campos, United States District Judge, presiding, and the issues having been duly tried, and the jury having duly rendered its verdict on April 29, 1981,

IT IS ORDERED AND ADJUGED that the Plaintiff Dorine Herndon, Personal Representative of the Estate of Charles Herndon, deceased, be awarded the sum of One Hundred Eighty-Three Thousand, Two Hundred and 00/100 Dollars ($183,200.00) against the Defendant Piper Aircraft Corporation.

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff Stellaretta O'Donnell, Personal Representative of the Estate of Thomas O'Donnell, be awarded the sum of Two Hundred Thirty-Two Thousand and 00/100 Dollars ($232,000.00) against the Defendant Piper Aircraft Corporation.

IT IS FURTHER ORDERED AND ADJUDGED that the Intervenor Seven Bar Flying Service, Inc. be awarded the sum of One Hundred Eleven Thousand, Eight Hundred and 00/100 Dollars ($111,800.00) against the Defendant Piper Aircraft Corporation.

IT IS FURTHER ORDERED AND ADJUDGED that said amounts shall bear interest at the rate of ten percent (10%) per annum from the date of entry of this Judgment; provided, however, the Court reserves jurisdiction for fifteen (15) days to assess interest from an earlier date. If no other date is specified within that time, interest shall run from the date of this Judgment.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs and Intervenor recover 80% of their taxable costs herein from Defendant Piper Aircraft Corporation.

DATED at Santa Fe, New Mexico, this 22nd day of May, 1981.

/s/ Santiago E. Campos
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

SEPTEMBER TERM—November 10, 1983
Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

DORINE HERNDON, Personal Representative of the Estate of Charles Herndon, deceased, and STELLARETTA O'DONNELL, Personal Representative of the Estate of THOMAS O'DONNELL, deceased.	)	
Plaintiffs,	)	
SEVEN BAR FLYING SERVICE, INC.,	)	
Plaintiff in Intervention-Appellee,	)	No. 81-1805
vs.	)	
PIPER AIRCRAFT CORPORATION,	)	
Defendant-Appellant,	)	
MITCHELL INDUSTRIES, INC.,	)	
Third-Party Defendants	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard. Judge Barrett voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

By Robert L. Hoecker
Chief Deputy Clerk

MR. HANSEN: Your Honor, I would ask the Court in consideration of that to view the very structive [sic] analysis of this entire issue including the Alt [sic] decision contained in Werner versus Upjohn—

MR. HOWIE: Is that the drug Werner case?

MR. HANSEN: —which is cited in my brief.

THE COURT: Do you have the xerox copy of that case?

MR. HANSEN: I do.

THE COURT: May I see it. I think that I have studied that decision previously.

MR. HANSEN: This is a decision that came out in August of 1980, Your Honor.

THE COURT: On reconsideration I'm going to allow the witness to testify concerning the subsequent remedial measure, and I'll probably be following the Alt [sic] rationale in line of cases. So now you gentlemen have a square, an issue squarely presented for appeal in the case.

APPENDIX "E"

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is espected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

APPENDIX "F"

MR. HANSEN: Your Honor, I have some similar items that I think should not be discussed during opening statement because of the almost guaranteed prejudicial effect of their being mentioned before the Court has had an opportunity to rule on the admissibility. Plaintiffs have several—well, they have over 100 exhibits listed, documentary exhibits. The first group of the exhibits that I would like to mention is the malfunction or defect reports or sometimes called service difficulty reports that the FAA receives.

They have listed many of those and I have a memorandum, Your Honor, on their admissibility and—

MR. HOWIE: We might be able to shorten things. I don't intend to go into any MD's or service difficulties on opening statement and on all these items I might—if counsel might stipulate. I don't think Mr. Smith is going to.

MR. HANSEN: Likewise, Your Honor, service bulletins that were promulgated by Piper Aircraft regarding the switch in question, I believe there is—I don't believe they're admissible in this case. And I have a memorandum on that. And I ask that those not be mentioned on opening statement.

THE COURT: Mr. Howie, Mr. Smith.

MR. HOWIE: Your Honor, I also have a memorandum on that that disputes this and brings the law up to date and relates to subsequent remedial measures. And if the Court will excuse me, I would be happy to go out and get it. And this is something that does need to be mentioned in opening statement because it's essential in this case.

THE COURT: Let's see your memorandum. Is this intended to be filed? Go ahead and sign that and make it a part of the file.

MR. HANSEN: (Complies.)

MR. BUTT: While we're waiting, Judge, there was one thing that came to my mind. We talked about the witnesses that Piper wanted subject to the ruling of the Court. I think that should apply also to exhibits and I have no idea what Mitchell exhibits Piper might want. I will direct myself to Mr. Hansen, other than the video tape that's been furnished to Mr. Smith.

MR. HANSEN: That's the only one.

MR. BUTT: When John comes back you might mention that. I will make any exhibit available as I did with the model.

THE COURT: Let's talk about service bulletin 331.

MR. HANSEN: Your Honor, that service bulletin was a service bulletin that was issued by Piper in 1971. This aircraft is manufactured in 1969 I believe, either '68 or '69. And during that interim period they modified the return mechanism for the thumb knob on the switch to replace a spongelike or rubber return mechanism with a coil spring mechanism.

THE COURT: What you had in the subject aircraft was a coil spring mechanism?

MR. HANSEN: That is correct. There was a coil spring mechanism that was introduced in to that in 1971. The subject aircraft had that service bulletin and subsequent airworthiness directive complied with by its owner. In other words, the spring was installed in accordance with that and we don't deny that Piper requested that this spring mechanism be installed. And it was ours. We designed it and now why that is relevant to this case, I don't know.

THE COURT: Mr. Howie, Mr. Smith.

MR. HOWIE: Your Honor, there are a couple of things that make service bulletin 331 relevant in this case. The first thing is that as Mr. Hansen pointed out, the spring that got into the switch that we believe caused the problem here was implemented because of 331. That's the first thing we got to get the switch in there, we got to get the spring in there.

THE COURT: Well, he is admitting responsibility for the spring, are you not?

MR. HANSEN: Yes.

MR. HOWIE: The second thing relates to the problems that they've had with this switch because the 331 and 527 are essentially the same type problem. Its manifested itself in the same way, but it's being caused by two separate things and that is the trim switch hung up in the nose-up or nose-down position. The behavior of the airplane is the same. It doesn't matter whether it's hung up because of this felt pad or silicone pad they had on 331 or the spring on 527.

Now, because of that it's very important because there were numerous instances where the Piper was put on notice this was an

unsafe condition when this trim switch hung up. And this was the same phenomena that was happening with service bulletin 527. And as far as the notice and history of the 331 relates to this hanging up of the trim switch, whether it would cause that to continue to return.

THE COURT: That was a rubber type return mechanism that was causing the problem. If we're going to talk about problems generally, that could be very—

MR. HOWIE: I'm not speaking of the problems with the switch in that case. I'm talking about what happens to the airplane, Your Honor, that Piper knew that when this switch hung up it was an unsafe condition because the FAA had told them and the history of service bulletin 331 and 527 when referred through the FAA documents show they're intertwined. It's just sort of a continuing chain of attempts to fix this switch.

THE COURT: Well, the attempt to fix the switch I think is not particularly relevant except as anyone might know that if you don't have a proper switch you're going to have a problem. Mr. Smith.

MR. SMITH: Your Honor, 331 was immediately followed by a mandatory FAA directive that if you incorporated on this airplane, therefore, I think it's significant that the FAA found it serious enough to require others to go back and purchase for whatever kit it was, the price the kit to install.

Bulletin 527 makes reference to bulletin 331. It states that Piper has had reports that even though bulletin 331 had been accomplished on certain airplanes, that there are still reports of switches hanging up. Therefore, the readers of 527 will be led to, naturally to inquire about what is 331. The two are like brother and sister.

THE COURT: Well, that can be taken care of if I submit 527, I suppose we could do a little doctoring there to eliminate any problems if I don't admit 331.

MR. HOWIE: The problem that we get into, Your Honor, is, one, that this airplane didn't come initially with the switch, with the spring in it. And I'm worried about the jury losing the continuity of how this spring got into that switch there.

THE COURT: Well, I think Mr. Hansen is willing to admit and probably will stipulate with you that the switch, that the coil in this mechanism, switch mechanism was something that was—

MR. HANSEN: Designed and sold by Piper.

THE COURT: And was in the airplane.

MR. HANSEN: That's correct, Your Honor.

THE COURT: And recommended for use in the airplane.

MR. HOWIE: Well, —

MR. SMITH: Well, Your Honor, could we then inquire of the Piper witnesses why did the FAA make it mandatory to put this switch in there?

THE COURT: I don't think this has any relevance.

MR. HOWIE: It relates to the flight condition, Your Honor, is what we're saying. When this hangs up, it either pitches up or down.

THE COURT: That's admitted, isn't it?

MR. HANSEN: No, it isn't Your Honor. That is a matter that the plaintiff has to prove. There's nothing in either one of those service bulletins that says that and there's no admission to that and—

THE COURT: Well, I don't know what is in the service bulletin.

MR. HANSEN: We're seriously—

THE COURT: What is the underlying cause for 331?

MR. HANSEN: The 331 is a more effective return mechanism for the switch.

THE COURT: Why do you—an effective return mechanism because if you don't then it goes—

MR. HANSEN: It may or it may not, Your Honor.

MR. HOWIE: That's something the jury is certainly entitled to consider, when the FAA comes in and puts their stamp on it that an unsafe condition exists with this phenomena of the hanging up, nose up and nose down, that is a logical inference and conclusion to be reached.

MR. HANSEN: Your Honor, we're objecting also to the admissibility and reference to airworthiness directives.

MR. HOWIE: I have a memo to that.

MR. HANSEN: And I do too. Your Honor, it's a hearsay statement. And with respect to whether or not that the—there's a finding of the switch being unsafe unless that is done, you might consider the content of the AD which says that you can fly the airplane three-quarters of the way around the world before you have to do anything about it, a 100-hour compliance time. And

that disputes to me and I think to any logical person that this is something of serious safety concern or that there was a finding.

Now, there's nothing before the Court about how these airworthiness directives are issued. And the—there are regulations about it. But in fact, what happens is that if there's not adequate compliance with a service bulletin, the airworthiness directive may be asked for. And I don't know whether it was in this case or not by the manufacturer to insure compliance with the service bulletin. There may be all kinds of reasons why the AD is issued and it doesn't necessarily mean that there's a finding by anyone. And the admissibility of these things is the plaintiff's way of proving the existence of a defect when what Piper has been trying to do is to advise others of necessary modification in accordance with their obligations and in accordance with the rationale behind 407 and—

THE COURT: 407. Pardon me, the rule?

MR. HANSEN: Rule 407. Now, the plaintiff wants to avoid his obligation of proof by relying upon these publications, one of which has absolutely nothing to do with the switch involved and the other of which was a year and a half after the crash. And we don't know exactly why that was issued, but certainly it is—it comes within Federal Rule of Evidence 407.

MR. HOWIE: If I might respond, Your Honor. I have certified documents from the Federal Aviation Administration notwithstanding Piper's desire to get people to comply in other cases. In this case they oppose the airworthiness directive that was issued on this switch, number one.

Number tw[sic], the airworthiness directive statute 14 CFR 93, point one, it is very short and I have a copy of it if I can bring it up to the Court that shows airworthiness directives are not issued by the Federal Aviation Administration except when the Administrator determines that an unsafe condition exists in the product. And number two, that condition is likely to exist in a large number of similar type designs.

It makes it very clear and the rules are very clear in this case. And evidence will show since this airplane was made in '65 they have only issued about 20 or 22 of these airworthiness directives. They're not issued lightly. Piper was given advance notice and they were given an opportunity to correspond and rebut it. And they didn't.

THE COURT: Perhaps if you—on that I would permit you to establish an evidentiary foundation concerning what you're telling me here. And then I might be better prepared to make a ruling on the admissibility of the airworthiness directives. But let me—

MR. HOWIE: Just one other thing, Your Honor. The Third Circuit addressed this in a case called *Melville* that I cited in the airworthiness directive memorandum. And it cites a Fifth Circuit case, *Muncie versus Party Doll Fleet*. The Court considers these made by counsel and is issued by a government agency and its only interest is safety. And Piper should have to come forward and show these people are unqualified and absent a finding such as these documents should not come in.

THE COURT: Well, I'm not going to—I will just during the—excuse me. Did you wish a ruling on the admissibility of airworthiness directives before opening statements?

MR HOWIE: I would like to have the liberty to refer to them on opening statement. And if that's something I can't live up to, if it's a proposal that I'm going to show this jury that is something I should have to live with, but I think I should be entitled to tell the jury what the FAA has.

THE COURT: I can give you a fast ruling on it. You might like a ruling. My ruling would be much better if I have an opportunity to think about it.

MR. HOWIE: Well, could we refer to it on opening statement, Your Honor?

THE COURT: I would prefer you wouldn't unless if there's some question on admissibility and there's the chance that I might rule against it.

MR. SMITH: Your Honor, in view of the time and the need yet for the panel to be chosen, is this something that perhaps could still be considered and ruled—

THE COURT: Could be considered between the time we choose the jury and the time you make your opening statement I suppose, but insofar as bulletins 331 and 527, I'm going to deny the motion in limine.

MR. HANSEN: You're going to—

THE COURT: I'm going to deny your motion in limine.

MR. HANSEN: You're going to permit them to refer to them, Your Honor?

THE COURT: I think these are probably admissible.

MR. HANSEN: Your Honor, I would like to make a comment, further comment about 527 because I haven't had an opportunity to speak to that. The plaintiffs claim a strict liability count in one breath and yet the arguments that they're using for admissibility of 527 are found in negligence.

Now, the feasibility of change, we haven't denied. We haven't denied the other exception to Rule 407 that would permit a subsequent modification to be admitted. And I submit, Your Honor, that there is no relevant reason unless it is squarely to show that we made a subsequent modification and that that infers a defect. And we believe that that in itself is several [sic] prejudicial and irrelevant under the rationale of 407.

Your Honor, the service bulletin itself does not say that there's a defect. It says that reports have been received. It does not say that it has been determined that there is a problem. It says that reports have been received. It also does not say what the result of the condition might be for a pilot. It says may and what it does, the admissibility of this would only permit the jury to speculate rather than rely upon that as proof of the existence of a defect or effect of the alleged defect.

THE COURT: May I see the bulletin 527?

MR. HANSEN: Your Honor, here is 527.

THE COURT: All right, your comment on 527, Mr. Howie and Mr. Smith.

MR HOWIE: Your Honor, service bulletin states the switch hangs up in the nose up, nose down position. I intend to put on testimony what the result of that hanging up is and what it can be. That service bulletin evidence will show is carefully screened by a group of folks, including Piper's lawyer, and they're not going to put anything in there that says it will hang up and cause your airplane to crash. But the jury is entitled to consider these facts. It is a products liability case and this is the type of evidence that is proper.

THE COURT: I will admit 527 and 331.

MR. HANSEN: Your Honor, on 331 I would like to know from counsel the purpose for its admission.

THE COURT: Well, I think it's admissible. I am not going to order counsel to let you know about it or to instruct you about it or to tell you about it. If he wishes to, he may do it on your own

time. Let's proceed.

MR. HANSEN: Your Honor, if I knew what purpose of either of these were, then I could ask for a limiting instruction. And I would like to ask the Court for a limiting instruction. If I knew the purpose for the admission of either of them, I will ask for a limiting instruction.

THE COURT: Go ahead and inform counsel counsel concerning your theory of admissibility on 331 and 527, Mr. Howie and Mr. Smith.

MR. HOWIE: Your Honor, it is set forth in the memorandum of authorities regarding subsequent remedial measures where it states, number one, Rule 407 is not applicable in a strict liability. That's one point.

Farner versus Paccar in the Eighth Circuit back a few years ago and *Robbins* followed in 1977 in the same circuit saying that.

Number two, this evidence of post-occurrence changes which tend to satisfy the plaintiff's burden on the issue of design defect, availability, costs, practicality, technical. They're not denying these design defects. If they're not denying this switch is defective, if they come out and stipulate to it then we don't have much of a problem. *Lolie versus Ohio Brass* in the Seventh Circuit in 1974 so held.

Thereafter, I guess the similar case on this issue is a case called *Ault versus International Harvester*. In all that is indicated under the federal cases holding that evidence of remedial measures is admitted in a products liability. And the commentators to Rule 407 cite *Ault* as authority. I believe those cases in the rationale, it will clearly support the admissibility of 331 and 527.

THE COURT: Mr. Smith.

MR. SMITH: I concur.

THE COURT: There you have it, Mr. Hansen.

MR. HANSEN: Okay. Your Honor, we haven't denied that there is availability or a cause, practicality or technological possibility of such a change. We do deny the existence of a defective design and, therefore, we request that the Court limit the admissibility.

THE COURT: Submit a limiting instruction, your proposed limiting instruction in writing, please.

MR. HANSEN: All right, Your Honor, we will.

THE COURT: What else are you going to use this afternoon, Mr. Howie?

MR. HOWIE: Exhibit 64 and 66, Your Honor.

THE COURT: Any objection to 64?

MR. HANSEN: Yes Your Honor, it's irrelevant.

THE COURT: What is FAR Part 39?

MR. HOWIE: Your Honor, this—FAR Part 39 is a provision out of the Code of Federal Regulations that relates to the issuance of airworthiness directives and sets forth the terms and conditions under which airworthiness directives will be issued.

THE COURT: That brings us back to—of the only two airworthiness documents that you're going to attempt to place in evidence are I-39 and I-38?

MR. SMITH: Yes, Your Honor, that's correct.

MR. HOWIE: We had them under a different number, but those are the two. That's not right, Bob.

THE COURT: The two directives are dated '71/12/5 and '77/9/10.

MR. SMITH: That's correct, Your Honor, those are the two intervenor-plaintiff intend to work with.

THE COURT: Mr. Howie, are those the only two that you're going to attempt to place in evidence?

MR. HOWIE: At this point, that's correct, Your Honor.

THE COURT: Let me see Bulletins 331 and 527.

MR.HOWIE: Might I approach the bench with these, Your Honor.

THE COURT: Yes, sir. Which part of 331 is the relevant—contain the relevant information concerning this case?

MR. HOWIE: Well, there are two or three portions, Your Honor. One portion of it is the serial number showing this was one of the aircraft that was effected as is shown in the serial number. The serial number of this aircraft was 274276. And so that would place it right in here between these two, 3944 and 46, 4467. Then this shows the part that is to be installed in the—

THE COURT: This is the coil to replace the—that sponge-like return mechanism?

MR. HANSEN: That's correct, Your Honor.

THE COURT: What is the date of this 331, February, 1971.

All right, Service Bulletin 331 issued by Piper Aircraft recommends the modification treated there, does it not?

MR. HOWIE: I believe that's correct, Your Honor.

THE COURT: And airworthiness directive dated 71/12/05 follows this bulletin?

MR. HOWIE: That is correct, as I understand it. Your Honor.

THE COURT: All right. Now, what does 527 do?

MR. HOWIE: 527 corrects the apparent problem tht was created by 331 because whenever they put this spring in there as called for in 331, it had an extra coil or part of an extra coil in it. So 527 refers to 331 and says that on certain aircraft produced during a certain time period and also those complying with 331 you need to go back and fix it.

THE COURT: And airworthiness document 77/9/10 follows Service Bulletin 527?

MR. HOWIE: That's correct, Your Honor.

THE COURT: Why do we need the airworthiness directives then?

MR HOWIE: Well, I think the airworthiness directives are relevant on a number of points, Your Honor. The Piper employees have gone to great length to deny that there is anything wrong or unsafe about this switch, notwithstanding a finding by the Federal Aviation Administration that an unsafe situation exists.

Piper's witnesses categorically, right down to the line, everyone we've deposed said there's nothing unsafe about this switch, it's a nuisance at best. The airworthiness directives and the issuance of an airworthiness directive itself shows that there's something much greater than nuisance involved in this switch.

Piper would lead us to believe through their witnesses that this is just a—essentially a cosmetic change. And the rules that govern the issuance of airworthiness directives I believe disputes that. And the evidence will be that the Federal Aviation Regulations of which Part 39 is one section are essentially the bible for airmen and aircraft designers.

THE COURT: Mr. Hansen.

MR.HANSEN: Your Honor, the airworthiness directives are redundant and they're also hearsay statements at best of a determination that there is, in fact—it is in fact necessary to take an inference from the regulations to determine from those

airworthiness directives that there is a determination of unsafeness or unsafe condition.

And I submit that it is grossly prejudicial and it's impossible for us to cross-examine anyone on how or why those airworthiness directives were issued. It might be merely because the service bulletins were issued and we are unable to cross-examine the so-called declarant as is contemplated under Rule 806 of the Federal Rules. Therefore, I think that not only does—it is duplicitous, but the prejudice that may arise from it far outweights the probative effect of it.

MR. HOWIE: Your Honor, I have a letter here dated March 11, 1977 that went to Piper Aircraft Corporation that was produced by Piper in discovery. They were sent a copy of this airworthiness directive that was going to require compliance with Service Bulletin 527. The FAA invited Piper to concur and/or comment concerning this enclosed airworthiness directive. And Piper didn't produce one piece of evidence in response to that.

MR. HANSEN: Your Honor, I don't know how counsel can say that.

THE COURT: Just a moment, please.

MR SMITH: Your Honor, the intervenor would like to add something.

THE COURT: Yes, Mr. Smith.

MR. SMITH: Bulletins are advisory. There's nothing mandatory about them. The directive is just what it states, it's a directive from the authority that certified the aircraft as airworthy and sets forth conditions which will make it airworthy again when they've been met in the directive. Therefore, they are not duplicitous in any way. They're simply an arm of the law, advising the aircraft owner that they cannot operate the airplane after a certain amount of time unless that directive is complied with.

MR. HOWIE: The other thing is important, Your Honor, when an airworthiness directive issued like that, it not only effects the aircraft that are out in the fleet, but also the aircraft that are on the production line because when this airworthiness directive is issued, this is a mandatory change to the production process for those aircraft. And it's not just a fix out in a field. This is a change that the FAA made Piper make on all their aircraft.

THE COURT: What underlies the airworthiness directives?

What investigations preceed the issuance of these directives?

MR. HOWIE: That procedure is set up under the authority of the Federal Aviation Administration, Your Honor, which—

THE COURT: What is it?

MR. HOWIE: What is the—

THE COURT: What is the procedure? For example, in this case you have this airworthiness directive issued 77/9/10. I'm looking at Plaintiff's Exhibit I-39. Now, it tells what should be done, but upon what are these conclusions founded?

MR. HOWIE: I think they're largely founded upon Piper's findings, Your Honor, because Piper has gone out and told the FAA that we have received reports. And Piper has adopted those reports. Piper has made their own investigation. And the FAA proposes an airworthiness directive and sends it back to Piper and says, "Piper, do you have any further input on the issuance of this airworthiness directive?"

THE COURT: So what you're telling me is that Piper has said in accordance with the service bulletin it has made a recommendation or—and I suppose that is all there is; that is, the meaning of a service bulletin is that it's just a—

MR. SMITH: Your Honor, I could cite a recent example when the DC-10 accident occurred at Chicago, airworthiness directives were followed immediately grounding the airplane until certain efforts were done. And that was the authority of the FAA to investigate what was obviously some kind of dangerous situation and until a fix had been determined.

THE COURT: Yes, but isn't that a different situation than that which we have here, if these two directives resulted from the two service bulletins which I have admitted, then the fact that the FAA issues these directives is just make way, isn't it, insofar as this lawsuit is concerned? It just adds a conclusion. What it amounts to is that FAA just agreed with Piper in a conclusion that apparently Piper came to.

MR. SMITH: Your Honor, just a moment ago Mr. Hansen said that he did not know Piper requested these AD's and frankly, I don't think they did. I know that another method of obtaining AD's is through reports of malfunctions that are submitted on these malfunctions and defect reports that have been mentioned earlier today. And when a significant number arise, then investigation follows.

THE COURT: So now what you're telling me is that you don't know insofar as these AD's are concerned what preceded them by way of investigation on the part of the issuer?

MR. SMITH: Other than they met the requirement of Federal Air Regulatión 39 as an unsafe situation and required a directive to have it complied with.

THE COURT: And it might well have been no more than the bulletins issued by Piper?

MR. SMITH: Well, Your Honor, Piper has issued over 600 bulletins and there are nowhere near that number of airworthiness directives. So there must be something significant that narrows the selection of the bulletin to merit the issuance of an airworthiness directive. Mr. Hansen has some figures on how many directives have been issued against the Aztec. And you will see it's really very few. And now we learn that something like 10 percent of them—

MR. HANSEN: Your Honor, I beg to differ with counsel.

THE COURT: Please permit Mr. Smith to finish his statement.

MR. SMITH: Approximately 20 have been issued against this model of airplane. And we find that two of the 20 are concerned with this very one switch which I believe highlights the importance of it to the FAA.

THE COURT: All right. I have admitted two service bulletins. I am not going to admit the two AD's identified as Plaintiff's Exhibits I-38 and I-39.

MR HOWIE: Your Honor, if I might just add, I believe the cases that have construed the admissibility of these airworthiness directives have placed the burden upon the party challenging it to show the lack of trustworthiness rather than the party offering the airworthiness directive to come forward with an affirmative showing of trustworthiness. There's been an implied finding of trustworthiness in that the Federal Aviation Administration is charged with aviation safety in the United States has issued these documents. And Piper should be required to come forward and show they lived with the issuance of this airworthiness directive.

Mr. Everly is the man that this letter was addressed to, he's a Piper employee, Piper should come forward and show why that there's some lack of trustworthiness with this airworthiness directive.

THE COURT: Well, in view of the tie-in between these two—pardon me, between the two AD's and the service bulletins and the absence of any showing then that these two AD's were issued as a result of the service bulletins byoyou [sic] I feel that under 403 that the probative value—pardon me, that the prejudice to the defendant would be outweighed by any probative value that these AD's might have because if they were in fact issued on the basis of these service bulletins, 527 and 331, then all we have is just possibly a make weight argument which may have no investigative strength behind the AD's other than the bulletins. That will be the ruling of the Court, gentlemen. Let's move on to something else.

MR. HOWIE: Your Honor, at the appropriate time may we re-urge them for impeachment of witnesses if thePiper witnesses get up here and say that there's nothing wrong with this switch?

THE COURT: I'm not going to anticipate what may develop in the trial. And if that happens, why, I will just address the matter when and if it comes up.

Let me return these to Mr. Smith. Those are his exhibits, aren't they, and here are service bulletins 331 and 527.

MR. HOWIE: Your Honor, so that the record is complete, on the basis of our urging these—admissibility of these two airworthiness directives, will the memorandum that we have submitted be received as the additional basis that the Court has considered and overruled for the admissibility of these airworthiness directives?

THE COURT: Yes, the memoranda had been read and it's in the file. And you should, of course, now that you have offered those directives make those part of the record, Mr. Howie.

MR. HOWIE: I think I will do that at this time if the Court wouldn't mind.

THE COURT: Well, I'm suggesting that you do.

MR. HOWIE: Your Honor, at this time the plaintiff would offer Intervenors Exhibit 38 and Intervenor's Exhibit 39, 38 being the airworthiness directive 71/12/05 and 39 being airworthiness directive 77/9/10.

THE COURT: And on your list; that is, the list of the exhibits in the pre-trial order, which two airworthiness—pardon me, which two exhibits are those?

MR.HOWIE: Well, those correspond to Plaintiff's Exhibit Number 30 which is the 331.

THE COURT: No. 30 is Service Bulletin 331, I have admitted that one.

MR. HANSEN: 66, Your Honor.

MR. HOWIE: This relates to Plaintiff's Exhibit 38.

THE COURT: 38 is 71/12/05.

MR. HOWIE: And Plaintiff's Exhibit 66 which I would also offer at this time, Your Honor. And we're only offering that portion of it that is 77/9/10 even though there are a couple of other documents on that page.

(WHEREUPON, Plaintiff's Exhibit 66 was offered into evidence.)

THE COURT: Well, I'm going to sustain the objection to, what is it, I what?

MR. HOWIE: Intervenor's 38 and 39.

THE COURT: Intervenor's 38 and 39 and Plaintiff's 38 and 66 which are duplicates.

(WHEREUPON, Plaintiff's Exhibits 38 and 66 and Intervenor's Exhibits 38 and 39 were refused by the Court.)

Q And does a service bulletin necessarily result in a design change to the aircraft?

A Not necessarily, but it generally would.

Q But an Airworthiness Directive always results in a design change?

A It certainly ought to, yes, sir.

Q If a corrective action is called for?

A That is correct.

MR HOWIE: Your Honor, again, at this time, the Plaintiff's would offer Plaintiff's Exhibits 38 and 66, based upon the authorities that have been set forth in the memorandum of authorities, relating to the admissibility of the Airworthiness Directives, specifically the *Melville* Case, and the *Muncie vs. Party Doll Fleet* case, and the authorities such as Robbins, out of the 8th Circuit, *Forner* [*sic*] *vs. Paccar* out of the 7th Circuit, and *Lollie vs. Ohio Brass* out of the 7th Circuit, which holds that any evidence that helps the Plaintiff meet its burden of proof, under the issue of defectiveness should be relevant and in strict liability context.

THE COURT: Mr. Hansen.

MR. HANSEN: Your Honor—

THE COURT: Have you changed your position?

MR. HANSEN: I have not changed my position.

THE COURT: Do you still object?

MR. HANSEN: Yes.

THE COURT: I am going to refuse the tender and sustain the objection. I think this is hearsay and in the context of this case, as I understand it, I don't believe that I should admit the Airworthiness Directives. The inference which I draw from thse two directives, in particular, the Plaintiff's 66, the Directive 77, 9 10, is that it is based solely on Service Bulleting [sic] Number 527, which I have admitted.

It isn't, as I see it, and there is nothing that has been presented to me from which I could conclude that this, that is what is contained in this directive is a matter observed pursuant to duty under Hearsay Exception 8038 [sic]. There is no indication that whoever prepared the directive made the observation, other than

from this service bulletin, and neither is the directive or the directive does not contain any factual findings made pursuant to authority insofar as I can tell.

Again, just looking at these two exhibits, I can only infer that the directive is based upon the Service Bulletin Number 527 and no more, that is, no other investigation by the FAA, and if that is the case, then it seems to me that we would be adding a prejudicial conclusion of an unsafe condition made by someone in FAA, based upon the matter that is contained in Service Bulletin Number 527. And in that circumstance, I would and do find that the underrule [sic] of Evidence 403, that the probative value of this opinion by an unspecified person, based upon unspecified investigation would, that the prejudice would exceed the probative matter.

And we will be in recess until one-thirty this afternoon.

MR. HOWIE: Your Honor, might I just get a couple more things into the record, to respond to the Courts's findings?

THE COURT: All right.

MR. HOWIE: And I'll make them very brief.

Q (Mr. Howie continuing) Mr. Kelly, who in the United States is charged with the enforcement of aviation safety in the civil sector?

A That would be the Federal Aviation Administration.

Q Is there anyone else who is charged with the governing of Airworthiness certificates and aviation safety, as it relates to civil aircraft such as 6920 Yankee?

A No, that is Federal Aviation Administration.

Q Mr. Kelly,—

MR. HOWIE: That is all I have, Your Honor. I have one additional exhibit that I would like to offer for the Court's consideration. This is what has been marked as Plaintiff's Exhibit 101, it is an excerpt from the Federal Register 30, Federal Register 8826, dated July 14, 1965, which was the amendment that created FAR Part 39, and I don't have a certified copy of it. I will get one if the Court requires it, but I will direct the Court's attention to near the bottom of the page that wherein this document it states that A.D.s are no different than any other types of rules issued by this agency, and we cannot and will not issue an A.D. unless we are convinced that its need and scope are fully justified.

THE COURT: All right. I am going to deny the tender, and if there is an objection to Plaintiff's Exhibit 101 at this time, I would sustain the objection.

MR. HANSEN: I object.

THE COURT: All right, the objection will be sustained. The further testimony of this witness doesn't change my view of the admissibility of these exhibits at this time, so we will be in recess until 1:30.

(Whereupon, the proceedings in chambers stood in recess, and the following proceedings ensued in the courtroom at 1:30 p.m.)

(WHEREUPON, the following proceedings were had in open court at 1:30 p.m., to-wit:)

THE COURT: During the noon hour I turned on the television and got an emotional high. I watched two Navy pilots step out of the shuttle, "Columbia," and step down to the desert floor. And I noted the age of one of the Navy test pilots, John Young, and it occurred to me that possibly Mr. Kelly or counsel for the intervenor might have been contemporaries of this test pilot, Navy test pilot, at the Academy. Your comments?

A I know Mr. Young from the Naval Air Test Section, sir.

MR. SMITH: Your Honor, I'm of another age, I'm sorry to say.

THE COURT: More of my age. In any event, I felt really good about the occurences this noon. Ready to proceed before the jury?

MR. HANSEN: The defendant is ready, your Honor.

MR. HOWIE: Ready, your Honor.

THE COURT: Before I ask the jury to come in, I'm going to extend my remarks concerning the tender which was made just at the close of the morning session. I'm not going to change my mind, Mr. Hansen.

MR. HANSEN: You are going to?

THE COURT: I'm not. But I do want to extend my remarks briefly. We don't have in these two airworthiness directives a recitation of any facts, evidentiary facts. I think what counsel would have me do, or I think what counsel for the plaintiff and counsel for the intervenor are attempting in the case is to introduce the airworthiness directive and the regulation, together with the regulation. And by juxtaposing, by putting these two together, to bootstrap a conclusion of unsafe condition before

this Court and before this jury.

I really don't think that that's what the exception to this hearsay rule has as its purpose. We're not dealing with, in the tender, really with any facts that are not before this jury already. I think it's an attempt to place a conclusion or an opinion of unsafe condition by the joint operation of the regulation and the directive.

That just fortifies my conclusion that I should not accept the tender.

Please ask the jury to come into the courtroom.

APPENDIX "I"

THE COURT: Just a moment, before you do, I have since Plaintiff's Exhibit 103 was offered and refused had an opportunity to review it briefly while we were—pardon me, while you were presenting testimony. This is a Department of Transportation document which relates to airworthiness directive 7112576110777910. And I might comment that after review of the matter which I suspected earlier has been confirmed or that which I suspected earlier has been confirmed and that is that the briefing paper for Piper Aircraft model listed on the exhibit, the amended, the proposed amendment to AD 71125, all of these indicate that the directives, the airworthiness directives issued by the FAA were based upon the service bulletins which have been admitted in evidence in this case.

And these documents and papers do not reflect that the FAA did anything other than take the recommendations. They conducted no investigations, no factual investigations of the switches in question. And apparently all they did was to consider the service bulletins and in effect put its approval or its imprimatur on Piper service bulletins; that is, the changes suggested by Piper.

So that I feel that the airworthiness directives really don't add anything to this case; that is, not already in the case. And this directive is no more than approval of a suggested change by or modification by Piper. I feel that again that the probative value, if any, of these directives, AD's, would be greatly exceeded by the possible prejudice and maybe even confusion under 430 [sic] rules of evidence. And for that reason again, I'm going to deny the admission of this exhibit, of these exhibits, anything related to the airworthiness directive.

I think that in the environment of this case that those should not be considered at all by the fact finder because of the possible prejudicial effect and really nothing to be gained by way of elucidation of factual matter or presentation of any new factual matter upon which the jury could base conclusions in this case.

FILED
APR 2 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1312

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PIPER AIRCRAFT CORPORATION,

Petitioner

v.

SEVEN BAR FLYING SERVICE, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE UNTIMELY PETITION FOR REHEARING TOLLED THE TIME WITHIN WHICH REVIEW FOR CERTIORARI MAY BE SOUGHT.

2. WHETHER FEDERAL RULE OF EVIDENCE 407 ENTITLED "SUBSEQUENT REMEDIAL MEASURES" IN A PRODUCTS LIABILITY CASE BASED UPON THEORIES OF NEGLIGENCE AND STRICT LIABILITY BARS THE ADMISSION OF EVIDENCE OF THE PRODUCT'S SAFETY THAT IS RELEVANT AND NOT PREJUDICIAL AS DETERMINED UNDER RULES 401 AND 403.

LIST OF PARTIES

The respondent accepts petitioner's List of Parties, and adds that in the case of respondent Seven Bar Flying Service, Inc., there are no parent companies, subsidiaries or affiliates.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Seven Bar Flying Service, Inc., the respondent herein, submits that a writ of certiorari should not be granted in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit filed September 2, 1983 is reported as *Herndon* v. *Seven Bar Flying Service, Inc.*, 716 F.2d 1322 (10th Cir. 1983). The judgment of the United States District Court for the District of New Mexico was filed May 22, 1981 and was not reported.

JURISDICTION

The respondent denies that the petition for rehearing filed by Piper Aircraft Corporation was timely, and therefore submits that a writ of certiorari herein should be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The respondent accepts petitioner's statement.

STATEMENT OF THE CASE

The respondent accepts the petitioner's Statement of the Case with the following exceptions and additions:

1. Circumstances of the flight.

O'Donnell and Herndon, the pilots killed in the crash, were both highly experienced. O'Donnell was taking training for the most advanced rating available to all pilots, the airline transport rating. This was a night flight, in clear weather, in which O'Donnell, seated in the left seat, wore a small visor-like hood which restricted his vision such that he was able to see only inside the plane, that is, only to view the instruments and not able to see outside at all. The jury found each pilot 10% negligent, and the manufacturer, Piper, 80% negligent.

2. Piper Service Bulletins.

Piper Service Bulletins, issued by the manufacturer Piper to owners and operators of the aircraft, set forth modifications, changes, or improvements that the Piper factory recommended be accomplished on all Piper aircraft that are

subject to the Bulletin. Piper's own witness MacDowell testified that Piper Service Bulletins had the highest priority of such information disseminated by the factory and that they would be considered "safety of flight" items. Expert mechanic Charles Craig testified out of the presence of the jury that Bulletins of the nature of Service Bulletin 331 and Service Bulletin 527 must be incorporated into the aircraft within the time limits specified or the aircraft would be considered unairworthy and its license invalid.

In contrast to the suggestion of Piper's Petition [p. 3], the incorporation of the improvement to the pilot's control wheel trim switch that was described in both Bulletins was more than an optional procedure. Through a governmental directive called an Airworthiness Directive, the Federal Aviation Administration informed all owners and users of the Piper Aztec aircraft, including the Aztec involved in the crash, *that it was mandatory* that the modification described in Bulletin 331 and Bulletin 527 be accomplished within 100 hours of flight time after the issuance of the Airworthiness Directive.

3. Airworthiness Directives.

Seven Bar sought to introduce Airworthiness Directives No. 71-12-05 and No. 77-09-10 which were directly concerned with Bulletins 331 and 527. In the case *Melville* v. *American Home Assur. Co.*, 584 F.2d 1306, 1315 (3rd Cir. 1978), Airworthiness Directives were admitted as an exception to the hearsay rule under F.R.E. 803(8). The District Court in the instant matter, with an abundance of caution and stating that the information was cumulative, denied admittance to either FAA Airworthiness Directive.

4. The admission into evidence of Piper Service Bulletin 527.

The reason for admittance of Piper Service Bulletin 527 was *not* "as direct proof of a product defect" as asserted by petitioner [pp. 3, 17, 20]. Citations in support of this very

specific claim are missing from the Petition, and respondent is not aware of any such statement in the record.

As part of the Statement Of The Case and concerning the issue of admittance of Bulletin 527, petitioner quoted the District Court's discussion and ruling allowing testimony concerning a subsequent remedial measure [p. 3 and Appendix "D", 52]. This is somewhat misleading and is suggestive that the court's words were in reference to Bulletin 527. At the time these words were spoken, the trial had been underway for three days, and Bulletin 527 had been admitted on the very first day. The subject of the court's words was a question asked of mechanic Craig regarding the use by Piper of a quick disconnect switch. Following objection by Piper that this was inadmissible under Rule 407, the court stated that the testimony would be allowed. However, Bulletin 527 was not being discussed at that time and had nothing to do with the disconnect switch.

5. Feasibility.

Contrary to the statement at p. 5 of the Petition, feasibility *was* an issue in the case.

In chambers, before the jury was selected, this subject was part of the general discussion regarding admittance of Bulletin 527. Counsel for Piper was given the opportunity to stipulate to the feasibility of the switch modification (which in fact involved only a snip of a wire cutter, clipping off a small section of a tiny 3-coil spring). Piper refused and instead agreed to submit a limiting instruction. *This instruction was never provided.*

The entire discussion concerning this subject is included in the Petition [Appendix "F", in particular at p. 61]. The Court of Appeals opinion, reported as *Herndon* v. *Seven Bar Flying Service, Inc.*, 716 F.2d 1322 (10th Cir. 1983), is reproduced as Appendix "A" of the Petition. The Appellate Court's reference to feasibility appears at p. 37 of the Petition.

REASONS FOR DENYING THE PETITION

1. Untimely petition for rehearing.

The petition for writ of certiorari filed by Piper Aircraft Corporation was not filed within the time required by Title 28, United States Code, Section 2101(c).

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on September 2, 1983.

Piper filed its petition for rehearing on September 19, 1983, three days after September 16th, the final day permitted by the Rules of Appellate Procedure, Rule 40. This petition was untimely. A motion to dismiss was filed by respondent on September 20, 1983, but the motion was not ruled upon by the Tenth Circuit.

Piper filed its petition for writ of certiorari on February 6, 1984, 67 days after the final day permitted by the aforesaid Title 28, United States Code, Section 2101(c).

The untimely petition for rehearing did not toll the time limitation of Section 2101(c). *United States* v. *Healy*, 376 U.S. 75 (1964).

Therefore, the petition for writ of certiorari herein should be denied.

2. The circuit "conflict" is exaggerated.

The asserted "raging conflict" or "war" between various jurisdictions over the issue of application of F.R.E. 407 to strict product liability claims is an exaggeration.

Petitioner has fashioned three categories of allegedly distinctly opposing positions among the Circuit Courts of Appeals. Several circuits have apparently not yet considered the issue. Of the three categories devised by petitioner only one circuit, the Eighth, comprises category No. 2, and one circuit, the Tenth, is assigned to category No. 3. The Tenth Circuit claims to have followed the Eighth Circuit. This is

hardly a "raging controversy between the various jurisdictions."

Petitioner describes the unsettled position of the Eighth Circuit and points to the varying application within the Circuit of F.R.E. 407 in strict liability cases. The Eighth Circuit has, with flexibility, altered its position to meet the individual circumstances of each case, and as noted by petitioner [p. 10] has recently taken a stance similar to petitioner's category 1.

Neither the Eighth nor Tenth has established a firm position in conflict with the other circuits. In reality, the "raging conflict" is nothing more than variations in the application of evidentiary rulings to match the circumstances of the individual cases.

Petitioner has traced the pattern of developing law within the Eighth Circuit [p. 9]. There is no need to repeat that herein. The very words of the Petition emphasize the point that this circuit has not taken a rigid position on the issue. Hence, "category 2" as identified by Piper is in reality not in conflict with the other categories.

Category 3, according to petitioner, results from the *Herndon* v. *Seven Bar Flying Service, Inc.* opinion, and allegedly demonstrates that within the Tenth Circuit, F.R.E. 407 does not apply to *any* situation involving strict liability [p. 10]. This expanded and incorrect interpretation by petitioner of *Herndon* is necessary to establish petitioner's third, so-called, conflicting category.

Herndon does not establish such a broad position for the Tenth Circuit. This is clear from a careful review of the opinion. *Herndon* supports the admission of evidence of subsequent remedial measures in this particular products liability action because of distinct factual conditions and certain strategy decisions made by Piper's counsel during trial.

The unique fact situation centers about the relationship of the government-issued Airworthiness Directives and the manufacturer-provided Piper Service Bulletins. Although

Piper succeeded in blocking admittance of the Airworthiness Directives, the underlying effect of these FAA orders was recognized by both the District Court and the Appellate Court. Under the rule of *Rozier* v. *Ford Motor Co.*, 573 F. 2d 1332, 1343 (5th Cir. 1978) and *Lolie* v. *Ohio Brass Co.*, 502 F. 2d 741, 744 (7th Cir. 1974), they were admissible as evidence of repairs made mandatory by government order. Thus, even if the District Court had not admitted Bulletin 527, it would have been required to admit the mandatory Airworthiness Directive which incorporated by reference, Bulletin 527 [pp. 40, 41].

This is a unique aspect of the *Herndon* opinion which undercuts petitioner's sweeping assertion that the Tenth Circuit has taken an exclusive position. Under the superior authority rule, *any* circuit court could support the District Court ruling, given similar circumstances.

The ruling on the *feasibility* issue of *Herndon* is a further demonstration that the Tenth Circuit's handling of this issue is not exceptional. The *Herndon* opinion notes the Fifth Circuit's endorsement in *Grenada Steel Indus., Inc.* v. *Alabama Oxygen Co.*, 695 F.2d 883 (5th Cir. 1983), of the line of reasoning which deems feasibility "controverted", unless expressly conceded.

Piper was asked to stipulate to the feasibility of modifying the pitch trim switch, but declined to so [pp. 37, 61]. Hence, the application of this exception to F.R.E. 407 by the Tenth Circuit is not exclusive. Rather, it is in line with the Fifth Circuit view of the feasibility exception.

There is no "raging conflict."

3. The opinion below was fair, accurate and correct.

As set forth above, the *Herndon* trial court refused to admit the Airworthiness Directives, considering there was a risk to Piper that overemphasis of the matter would have a prejudicial effect. At the same time, the court specifically asked counsel for Piper to submit a proposed instruction to

limit the admissibility of Bulletin 527, and Piper failed to do so [p. 61].

Piper now seeks to gloss over this omission with the claim that the Bulletin was admitted as evidence of a defect and, therefore, a limiting instruction would have been absurd and would have been refused.

This is totally misleading. First, the court itself requested a limiting instruction. Second, the court never specifically said that 527 was admitted to prove a defect.

Additionally, the court responded to Piper's objection regarding testimony of pilots who had experienced similar inflight emergencies but survived. To avoid cumulative evidence, the plaintiffs were permitted to only read the transcript of one pilot's testimony in rebuttal to testimony of Piper's pilot witness [p. 30].

It is abundantly clear that the court sought to be fair.

Furthermore, there was other tangible evidence adduced of the nature of the specific switch defect and of the unwanted driving of the stabilator trim jackscrew to the full nose down position.

CONCLUSIONS

The "three distinct positions" contrived by petitioner to support the claim of a "raging controversy" between Circuit Courts are illusions.

First, the petitioner admits that three circuits have not even ruled on the issue of the application of Rule 407 in a products liability case. Thus, not all circuits are represented in the "conflict".

Second, the petitioner has admitted that the Eighth Circuit, comprising category two, has altered its position such that it is not in conflict. This is demonstrated by a recent decision of the circuit in which application of Rule 407 to a strict liability action was upheld.

Third, the position of the Tenth Circuit, supposedly establishing a third, mutually exclusive position, is in reality merely an application of recognized evidentiary rules common to all circuits.

The Tenth Circuit upheld the admission of Bulletin 527 based on consideration of the District Court's evidentiary decision as a whole.

In particular, this included noting that (1) petitioner was offered the opportunity to stipulate to feasibility and failed to do so and (2) that petitioner was asked by the District Court to provide a limiting instruction and failed to do so.

The Tenth Circuit also pointed out that if the Bulletin had not been admitted, the same information would have been before the jury through the Airworthiness Directive.

Petitioner's argument that the Tenth Circuit has taken the position that Rule 407 does not apply to *any* situation involving strict liability is purely a distortion. No such sweeping generalization can be supported.

When the hullabaloo raised about circuit conflict is dismissed, all that remains is an effort by petitioner to seek yet a third review of the lengthy trial record. The opinion below

accurately and correctly supports a result that was fair and reasonable.

For the reasons set forth above, the respondent herein submits that a writ of certiorari should be denied in this case.

Respectfully submitted,

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L. B. Ullstrom

/s/ ROBERT P. SMITH

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Seven Bar Flying Service, Inc.

CERTIFICATE OF SERVICE

I, Robert P. Smith, one of the attorneys for Seven Bar Flying Service, Inc., respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the twenty-ninth day of March, 1984, I served copies of Seven Bar Flying Service's Brief for the Respondent in Opposition on Piper Aircraft Corporation, petitioner herein and the only other party herein, by mailing copies in a duly addressed envelope, with first class postage prepaid, to its attorney of record.

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AFFIDAVIT OF MAILING

I, Robert P. Smith, one of the attorneys for Seven Bar Flying Service, Inc., respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on this twenty-ninth day of March, 1984, I deposited in the United States Post Office located at 1823 Stout Street, Denver, Colorado, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, respondent Seven Bar Flying Service's Brief for the Respondent in Opposition.

_____

Robert P. Smith

State of Colorado)
) ss
County of Denver)

Subscribed and sworn to before me at Denver, Colorado, this twenty-ninth day of March, 1984.

_____

Notary Public

Office - Supreme Court, U.S.
FILED
APR 11 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1312

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

PIPER AIRCRAFT CORPORATION,

Petitioner

v.

SEVEN BAR FLYING SERVICE, INC.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER PIPER AIRCRAFT CORPORATION

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APPENDIX

A. "Petition For Rehearing, And Suggestion For Rehearing In Banc" of Piper Aircraft Corporation with "Certificate of Mailing" 5-11

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REPLY[1]

The reply will be organized as follows: (1) Reply To Certain Statements in Respondent's "Statement Of The Case"; (2) Reply To No. 1 of "Reasons For Denying The Petition"; (3) Reply To No. 2 of "Reasons For Denying The Petition"; (4) Reply To No. 3 of "Reasons For Denying The Petition".

1. *Reply To Certain Statements In Respondent's "Statement Of The Case"*

Much of Respondent's "Statement Of The Case" is improper in that it is legal argument. Several statements, however, need to be addressed.

a. In item no. 4, Respondent states that:

> "The reason for admittance of Piper Service Bulletin 527 was not as 'direct proof of a product defect' as asserted by petitioner [pp. 3, 17, 20]." (Brief In Opposition, p. 4)

This statement by Respondent is incredible in light of the express acknowledgment in its "Appellee's Brief" before the Tenth Circuit that "Piper Service Bulletin 527 was offered and admitted under the rationale of *Ault v. International Harvester Company*, 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1975)." (See, Petition For Writ of Certiorari, p. 4, n. 1.) It is also incredible in light of the District Court's express statement that it was admitting the bulletin under the rationale of *Ault*. (See, Petition For Writ of Certiorari, pp. 3-4.) Respondent is now apparently attempting to tell this Court that the bulletin was not admitted under *Ault*. Such is a plain and inexplicable refusal to adknowledge what this case is all about as even a cursory reading of the Tenth Circuit's opinion clearly shows.

b. In item no. 5, Respondent discusses feasibility and states that "Piper was given the opportunity to stipulate to... feasibility.... "(Brief In Opposition, p. 4) Petitioner simply

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[1] As new information has been provided to the undersigned counsel regarding the status of Piper Aircraft Corporation pertinent to Supreme Court Rule 28.1, item no. 3 of the "List of Parties" (Petition For Certiorari, p. ii) is withdrawn and the following substituted therefore. Piper Aircraft Corporation is a wholly-owned subsidiary of Bangor Punta Corporation. Bangor Punta Corporation is a wholly-owned subsidiary of Lear-Siegler Corporation. Piper Acceptance Corporation is a wholly-owned subsidiary of Piper Aircraft Corporation.

observes that "opportunity" is not the issue on appeal. The issue is the correctness of the Tenth Circuit's ruling that "[u]nless a manufacturer expressly concedes [feasibility], the manufacturer should be deemed to dispute that fact...." (See, Petition For Writ of Certiorari, pp. 17-18) The language of F.R.E. 407 is clear in *not* requiring such an affirmative concession. See, e.g., *Werner v. Upjohn Co., Inc.*, 628 F.2d 848 (4 Cir. 1980), cert. den. 449 U.S. 1080.

2. *Reply To No. 1 Of "Reasons For Denying The Petition*

In item no. 2, Respondent urges that the petition for rehearing filed by Petitioner in The Tenth Circuit was untimely. This argument is frivolous. Significantly, Respondent attaches no documents as appendices to support the dates recited in this argument. Respondent made a similar argument in the Tenth Circuit in a document entitled "Appellee's Motion To Dismiss Appellant's Petition For Rehearing." Given the fact that the Tenth Circuit heard and denied the petition for rehearing (with one judge voting to grant rehearing—see, Petition For Writ of Certiorari, Appendix, pp. 50-51), it would seem clear that Respondent's argument was rejected. Petitioner submits that this argument should more properly have been raised in a cross-petition for certiorari under Supreme Court Rule 20.5 and that Respondent's failure to do so amounts to a waiver.[2]

---

[2] In any event, Respondent cannot prevail on the merits. The petition for rehearing was mailed on September 16, 1983. It apparently did not arrive at the Tenth Circuit in Denver in the due course of the mails until September 19, 1983. Respondent contends that September 16, 1983 was "the final day" for filing the petition. (Brief In Opposition, p. 5) Assuming that to be true, the petition was timely filed. F.R. App. Pro.40(b) provides that the petition "shall be served and filed as prescribed by Rule 31(b) for the service and filing of *briefs.****" (emphasis added) F.R. App. Pro. 25(a) states that "...briefs...shall be deemed filed on the day of mailing...." As the petition was mailed on September 16, 1983, it is deemed timely filed. The "Petition For Rehearing, And Suggestion For Rehearing In Banc" with "Certificate Of Mailing" is attached as Appendix "A", 5-11.

Further, even assuming (without conceding) that the petition was untimely, the Tenth Circuit had the power to consider the petition in any event. See, e.g., *Braniff Airways, Inc. v. Curtiss-Wright Corporation*, 424 F.2d 427 (2 Cir. 1970), cert den. 400 U.S. 829.

3. *Reply To No. 2 of "Reasons For Denying The Petition"*

Respondent claims that Petitioner's asserted conflict over F.R.E. 407 is an exaggeration. Petitioner submits that the cases and other authorities submitted by Petitioner amply support its position of conflict whereas Respondent cites no authority to the contrary. Respondent's attempt to facilely gloss over the differences among the Circuits ignores the fact that the Tenth Circuit expressly acknowledged such differences at various points during the course of its opinion. In particular, in the Appendix to its opinion, the Tenth Circuit explicitly observed that "[s]everal circuits have read Rule 407 to exclude evidence of subsequent remedial measures in strict liability, products manufacturers cases." (See, Petition For Writ of Certiorari, Appendix, p. 44) How Respondent can say that this is not contrary to the Tenth Circuit's holding of admissibility in the instant case escapes Petitioner. Similarly, the Tenth Circuit explicitly acknowledged the "split of authority among state courts, ..." (See, Petition For Writ of Certiorari, Appendix, p. 44)

Petitioner feels very comfortable in asserting the existence of a conflict as to F.R.E. 407.

4. *Reply To No. 3 Of "Reasons For Denying The Petition"*

Petitioner obviously disagrees that "[t]he opinion below was fair, accurate and correct." (Brief In Opposition, p. 7) Respondent is apparently referring to the decision of the District Court. The decision of the District Court was to admit the subsequent remedial measures evidence pursuant to the rationale of *Ault v. International Harvester Company*, supra. Petitioner contends that this was not a correct decision. Being incorrect, it can be neither fair nor accurate. Petitioner further contends that the Tenth Circuit continued the error and compounded it by going beyond the fairly confined decision of the District Court to discuss matters not at issue below.

Once again, Respondent states that "the [District] court never specifically said that 527 was admitted to prove a defect." (Brief In Opposition, p. 8) This incredible statement has already been addressed supra.

CONCLUSIONS

Petitioner disagrees with Respondent's conclusions in their entirety. First, three distinct positions concerning the applicability of F.R.E. 407 to claims sounding in strict liability in tort clearly do exist. Since F.R.E. 407 is an Act of Congress, this is improper. Second, Petitioner has not admitted that the Eighth Circuit has "altered its position such that it is not in conflict." (Brief In Opposition, p. 8) Quite to the contrary, it appears to Petitioner that the Eighth Circuit has the most unworkable scheme of all. Third, Petitioner merely observes that, contrary to Respondent's argument, the Tenth Circuit itself acknowledged that its position differed from that of other Circuits. Indeed, Petitioner feels that the Tenth Circuit, in the sheer scope and audacity of its opinion, went out of its way to invite this Court to review the "hullabaloo" (Brief In Opposition, p. 9) which surrounds F.R.E. 407 nationwide.

Petitioner respectfully requests that the petition for writ of certiorari be granted.

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DORINE HERNDON, Personal
Representative of the Estate
of Charles Herndon, Deceased,
and STELLARETTA O'DONNELL,
Personal Representative of
the Estate of Thomas O'Donnell,
Deceased,

Plaintiffs,

vs. No. 81-1805

SEVEN BAR FLYING SERVICE, INC.,

Plaintiff-in-Intervention
-Appellee,

vs.

PIPER AIRCRAFT CORPORATION,

Defendant-Appellant.

PETITION FOR REHEARING, AND SUGGESTION FOR REHEARING IN BANC

Defendant-Appellant Piper Aircraft Corporation, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, petitions this Court for rehearing of the instant appeal following entry of this Court's Judgment on September 2, 1983. Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, Piper also suggests that a rehearing, if any, be heard in banc. As grounds for its Petition for Rehearing, Piper submits that the Court has overlooked or misapprehended certain points of fact and law in affirming the trial court on the basis of Rule 407 of the Federal Rules of Evidence.

At the trial level, the trial court admitted into evidence, over Piper's objection, Piper Service Bulletin 527 which described a remedial measure to the pitch trim switch of certain aircraft manufactured by Piper. The bulletin was published over a year after the accident in question. This Court affirmed the trial court's judgment solely on the basis of the admissibility of Piper Service Bulletin 527. In so holding, this Court relied upon the following:

(1) Piper did not stipulate to the feasibility of modifying the pitch trim switch;

(2) Rule 407 of the Federal Rules of Evidence, excluding evidence of subsequent remedial measures, is inapplicable in a strict products liability case;

(3) Even if Service Bulletin 527 were excluded under Rule 407, essentially the same evidence would have been presented to the jury through the Federal Aviation Administration's Airworthiness Directives which were admissable under Rule 407.

Contrary to this Court's assertion and its opinion at Page 14, Piper did indeed stipulate to the feasibility of modifying the pitch trim switch. For example, during arguments to the court over the admissibility of Service Bulletin 527, Piper's attorney stated: "Now, the feasibility of change, we haven't denied." [Tr. Vol. II, p. 41]. Piper's attorney also stated: "We haven't denied there is availability..., practicality or technological possibility of such a change." [Tr. Vol. II, p. 44]. Thus, the admission of Service Bulletin 527 does not fall within the exception to Rule 407 which permits the admission of evidence of subsequent remedial measures if feasibility is controverted.

With respect to the Court's decision that Rule 407 does not apply in strict products liability cases, Piper wishes to point out that this Court and the Eighth Circuit Court of Appeals are alone among all the circuits in so deciding. Only the Ninth Circuit has failed to address the issue. *Longenecker v. General Motors Corporation*, 594 F.2d 1283 (9th Cir. 1979). All others except the First Circuit have explicitly held that Rule 407's exclusionary principles apply with equal force in strict products liability cases. *Cann v. Ford Motor Company*, 658 F.2d 54, 60 (2nd Cir. 1981), *cert. den'd*, 456 U.S. 960 (1982); *Josephs v. Harris Corporation*, 677 F.2d 985, 991 (3rd Cir. 1982); *Werner v. Upjohn Company, Inc.*, 628 F.2d 848, 856-858 (4th Cir. 1980), *cert. den'd*, 449 U.S. 1080 (1981); *Grenada Steel Industries, Inc. v. Alabama Oxygen Company, Inc.*, 695 F.2d 883, 885-889 (5th Cir. 1983); *Hall v. American Steamship Company*, 688 F.2d 1062, 1066-1067 (6th Cir. 1982); *Oberst v. International Harvester Company, Inc.*, 640 F.2d 863, 866 (7th Cir. 1980). Although the *Werner* case dealt with a drug manufacturer's failure to warn, the holding in that case was not limited to its facts.

In addition to the six circuits listed above which have found Rule 407 to be applicable in strict products liability cases, the First Circuit Court of Appeals has indicated that it will follow the clear majority rule. In *Roy v. Star Chopper Company, Inc.*, 584 F.2d 1124, 1134 (1st Cir. 1978), *cert. den'd*, 440 U.S. 916 (1979), the court summarily affirmed the trial court's exclusion of evidence under Rule 407 in a case submitted to a jury under strict liability only. Subsequently, the First Circuit noted in dictum that "post-manufacture evidence cannot be used to prove the defective design of the product at the time it was manufactured." *Estate of Spinosa v. International Harvester Company*, 621 F.2d 1154, 1160 at No. 5 (1st Cir. 1980).

As this Court noted in its Opinion, the Eighth Circuit, alone among all the circuits has consistently found Rule 407 to be inapplicable in strict products liability cases. However, the Eighth Circuit's stalwart stance appears to be wavering in light of the rejections of its holding by the majority of the circuits. In McGowne v. Challenge-Cook Bros., Inc. 672 F.2d 652,665 (8th Cir. 1982), the court reversed judgment in favor of the defendant on grounds of an erroneous instruction. The court went on to address various evidentiary issues raised by the appellant,

including the trial court's exclusion of evidence of post-accident warning notices placed on the product by the manufacturer. The Court stated:

> "This assignment of error raises questions in a developing and changing field of law. If these questions recur on retrial, they must be determined on the *then* controlling legal principles and decisions."

[Emphasis added]. The court then goes on to note the decision in *Cann, supra*, in contrast to the court's own decision in *Farner v. Paccar, Inc.*, 562 F.2d 518 (8th Cir. 1977).

This Court's decision is based in part upon the inapplicability of the policy reasoning behind Rule 407. Underlying the Rule is the desire to encourage tort feasors to take steps to remedy hazardous conditions. The exclusion of evidence of subsequent remedial measures, therefore, permits tort feasors to make such changes without the fear of such evidence being used against them in subsequent lawsuits. This Court notes that:

> "...it is unrealistic to think a tort feasor would risk innumerable additional lawsuits by foregoing necessary design changes simply to avoid the possible use of those modifications as evidence by persons who have already been injured."

(*Herndon* Opinion at p. 10). If the policy reasoning underlying Rule 407 is "unrealistic," then it should not be applied in any case, including negligence cases. This Court's Opinion in essence guts Rule 407. The distinctions relied upon by the Court in finding Rule 407 inapplicable in strict liability cases do not in fact exist. The Court consistently relies upon the difference between negligence and strict liability, in that in a negligence case a jury must focus upon the defendant's conduct, while in a strict liability case, the jury must focus on the product itself. But as the Fourth Circuit noted in *Werner, supra*,

> "It makes no difference to the defendant on what theory the evidence is admitted; his inclination to make subsequent improvements will be similarly repressed. The reasoning behind this asserted distinction we feel to be hypertechnical, for the suit is against the manufacturer, not against the product."

Werner, supra, 628 F.2d at 857. If this Court recognizes the validity of Rule 407 at all, it must recognize the policy reasoning which compelled Congress to adopt it. In turn, the Court must recognize that the policy encouraging tort feasors to remedy hazardous conditions applies with equal force to a manufacturer accused of negligence as to a manufacturer sued in strict tort liability.

As an additional ground for affirmation, this Court notes that the trial court excluded as cumulative Airworthiness Directives issued by the Federal Aviation Administration which would have instituted the same change mandated by Service Bulletin 527. Piper respectfully submits that the cumulative effect of the Airworthiness Directives was not the basis for the trial court's exclusion of them as evidence. In the course of the argument as to the Airworthiness Directives' admissibility, the court expressed concern over the investigative basis for the directives, to which the plaintiffs' attorney replied:

> "I think they are largely founded upon Piper's findings, your Honor, because Piper has gone out and told the FAA that we have received reports...Piper has made their own investigation."

[Tr. Vol. II, p. 113]. In excluding the Airworthiness Directives, the court cited Rule 403 and stated that the prejudice of the directives outweighed their probative value, and indicated a concern that there was "no investigative strength behind the ADS other than the bulletins." [Tr. Vol. II, p. 116]. It is thus clear that the court in its discretion would not have admitted the Airworthiness Directives even had it excluded Service Bulletin 527. The court's statements indicate that it questioned the trustworthiness of the Airworthiness Directives themselves. In addition, the changes outlined in Service Bulletin 527 were not required by a superior authority. Service Bulletin 527 was itself a mandatory directive [Tr. Vol. V, p. 24].

In relying upon the Airworthiness Directives' admissibility under Rule 407, this Court again relies upon the policy reasoning underlying Rule 407; that is, the encouragement of subsequent remedial measures. If a superior authority requires the measures, the policy does not apply. However, it was Piper who initially made the mandatory changes. The Federal Aviation Administration's subsequent adoption of Piper's own remedial measures

does not eliminate the evils sought to be avoided by Rule 407. Pursuant to the policy reasoning of Rule 407, had Piper known that its service bulletin would be used against it in a strict products liability case. it may have refrained from making those changes and from issuing Service Bulletin 527. In such a situation, the Airworthiness Directives directing Piper to make such changes would clearly be admissible under Rule 407. However, in the instant case , Piper's taking the initiative in instigating the changes in the first place constitutes the very behavior sought to be encouraged by Rule 407.

For the foregoing reasons, Piper respectfully petitions this Court for a rehearing, and suggests that the rehearing be held in banc.

Respectfully submitted,

CIVEROLO, HANSEN & WOLF, P.A.

By /s/ Cynthia A. Fry

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CERTIFICATE OF MAILING

The undersigned hereby certifies that she mailed the original and three copies of the Petition for Rehearing to Howard K. Phillips, Clerk, United States Court of Appeals for the Tenth Circuit, C404 United States Courthouse, 1929 Stout Street, Denver, Colorado 80294; and mailed two copies to Robert P. Smith, Attorney, 601 Broadway, Suite 400, Denver, Colorado 80203, this 16th day of September, 1983.

/s/ Cynthia A. Fry

Cynthia A. Fry